Supreme Court, U.S.
FILED
991695 JAN 19 2000
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

Defendant A,

Petitioner,

v.

Idaho State Bar,

ON PETITION FOR WRIT OF CERTIORARI
TO THE IDAHO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Gordon W. Jenkins
JENKINS LAW OFFICE
2595 Channing Way
Idaho Falls, ID 83404
Tel.: (208) 524-2650

Petitioner

148pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Idaho Supreme Court erred in dismissing Appellant's Appeal?

2. Whether Appellant's Constitutional rights were violated in the attorney disciplinary proceedings against him?

3. Whether the attorney disciplinary rules of the Idaho State Bar Commission are too vague and over-broad to be Constitutionally enforceable?

4. Whether the designated enforcement and judicial process for attorney disciplinary proceedings pursuant to the Idaho State Bar Commission Rules are unconstitutional?

PARTIES TO THE PROCEEDINGS

1. Appellant, Gordon W. Jenkins, named as "Defendant A" in the caption of the case.

2. Respondent, Idaho State Bar, per the caption of the case.

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CITATIONS OF OPINIONS AND ORDERS ENTERED IN THE CASE

1. Order of the Supreme Court of the State of Idaho, No. 25727, Ref. No. 99S-213.

2. Order of the Supreme Court of the State of Idaho, No. 25095, Ref. No. 98S-291.

STATEMENT OF THE BASIS FOR JURISDICTION

The Order for which Appellant seeks review is an Order of the Idaho Supreme Court entered on the 21st day of October, 1999. The Court has jurisdiction to review on a writ of certiorari the order in question pursuant to Title 28 section 1257(a).

CONSTITUTIONAL PROVISIONS

Amendment to Constitution Article XIV section 1 states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment to Constitution Article V states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari being made by the Appellant, Gordon W. Jenkins, is related to various disciplinary proceedings conducted by the Idaho State Bar Association (ISB) regarding Appellant's legal representation of a former client named Nicholasa Perez in a personal injury case. These actions were presumably taken pursuant to the Idaho Bar Commission Rules for Review of Professional Conduct (a copy of which is included in the Appendix) but were taken in such a manner so as to violate these same rules and violate Appellant's constitutional rights. These rules are also so vague so as to allow for inconsistent interpretations on crucial issues. This Petition is being pursued for the purpose of respectfully requesting that the Supreme Court of the United States of America issue the following rulings:

1. That said Idaho State Bar Commission Rules as presently constituted are too vague to be enforceable.

2. That the designated enforcement and judicial process for attorney disciplinary proceedings in the State of Idaho are unconstitutional.

3. That in regards to the disciplinary proceedings against the Appellant, said proceedings violated my constitutional rights as protected by the Constitution of the United Sates of America and therefore, must be dismissed.

Statement of Facts:

1. Appellant was admitted to the Idaho State Bar Association in September, 1976.

2. During all of the times related hereto, the Idaho State Bar Association was under the direction of its Bar Counsel, Michael Oths. His functions under ISB's direction and control were as follows:

A. As part of ISB, Mr. Oths supervises the group that conducts disciplinary investigations, responds to ethical questions, serves as prosecutor in discipline cases, handles claims for Client Security Fund, and is General Counsel to the ISB. In other words, he is the policing force and investigator to prove cases against the attorneys charged with disciplinary violations.

B. As part of this same ISB, an administrative assistant functions as the Clerk of the Professional Conduct Board. This administrative assistant and Mr. Oths help determine when a hearing committee will be selected on a case, who will be on the committee, and what cases said hearing committee will hear. In other words, the ISB gets to select the individuals sitting as judge and jury in relation to the alleged disciplinary charges that it brings against an attorney.

C. In addition, there are various instances when decisions are appealed such as when the matters are brought pursuant to Rule 509 of the Idaho Bar Commission Rules, such as in this case. Rule 509 is considered to be the "more informal" approach to disciplinary actions. In this case, again the ISB oversees, selects and controls the actions of the appellate body that would first review the decision being appealed to a hearing committee.

3. During all times related to this case, the Idaho Bar Commission Rule under which this case was initially pursued consisted of Rule 509 (the informal disciplinary approach) which Rule is included in its entirety in the Appendix N, along with Rule 11 (the formal disciplinary approach).

4. Rule 509 spells out the steps to be followed from the very first filing of an allegation with the ISB to the final appeal to the Idaho Supreme Court. The authority and obligations of each party involved in this process are specifically stated. Time frames and procedures for the various processes are detailed and designated as rules to be followed by the parties.

5. In this case, Mrs. Perez was represented by legal counsel who was Mr. David Maquire of Pocatello, Idaho.

6. The circumstances of Appellant's disciplinary proceedings and the facts that are the basis for this Petition are as follows:

> 1. In March of 1994, the Petitioner retained Jenkins Law Office to represent her in a personal injury action.
>
> 2. When the personal injury case settled on 3/20/95 a Settlement Disbursement Sheet was filled out, signed and approved by all parties.
>
> 3. Some time after the settlement, Mrs. Perez changed her mind and became upset with Appellant.
>
> 4. Appellant was first contacted in July, 1995 by an attorney by the name of Stephen Bywater who, at the request of Nicholasa Perez, asked various questions about the set-

tlement. Appellant responded to Mr. Bywater who later indicated that he was satisfied and did not intend to pursue the matter further.

5. Mrs. Perez, in January, 1996, had a second attorney by the name of David Maguire write the Idaho State Bar Association in order to begin a grievance procedure through the ISB.

6. The ISB contacted Appellant in April of 1996 about said grievance and sent him a copy of Mr. Maguire's letter.

7. Appellant responded to the ISB grievance letter shortly thereafter providing documentation related to Mrs. Perez's allegations.

8. Under the auspices of Rule 509, Mr. Dan Grober of the ISB reviewed Appellant's documentation and on October 29, 1996, rendered a decision to dismiss the grievance of Nicholasa Perez. (Appendix D)

9. As part of said 10-29-96 letter notifying all parties of the dismissal, a specific notice was included in the letter indicating that Mrs. Perez or her attorney had fourteen (14) days to file an appeal of the ISB decision.

10. The final date to file said appeal was November 12, 1996. This date passed without any Notice of Appeal being filed by either Mrs. Perez or her attorney.

11. On February 27, 1997, Mrs. Perez discussed her

feelings with a sympathetic friend who prepared a another letter requesting an appeal and acknowledging that she knew of the time period to appeal was fourteen days but had "difficulty finding someone to translate for her and write the letter" even though she had an attorney representing her and she has two teenage children named Francisca and Pelo, who speak perfect English that were residing in her home.

12. The previous letter was not served on Appellant by Mrs. Perez. Appellant did subsequently get a copy of said letter from the ISB.

13. After the ISB received the 2-24-97 letter from Nicholasa Perez, the ISB re-instituted the exact same charges against Appellant and presented these charges a second time. This time it was dated May 1, 1997, and was filed as a formal Notice of Assignment to Committee or an appeal of the prior charge. (Appendix E)

14. This assignment to a Hearing Committee occurred in spite of the previous dismissal of the charge and lapse of time for appeal.

15. Said notice indicated, "Pursuant to Rule 509(c)(3) of the Rules for Review of Professional Conduct, along with the approval of the Idaho Supreme Court, this matter is hereby assigned to a Hearing Committee consisting of Michael Kane (Chair), Hugh Mossman and Larry Lucas."

16. Prior to the passing of the twenty-one (21) day deadline required by Rule 509(c)(6), each of the three hearing committee members filed letters regarding their decisions with the Clerk of the Professional Conduct Board. (Appendices F, G, and H)

17. No other decision documents existed within the twenty-one (21) day time period required by the Rule 509(c)(6). The decision was in favor of the Appellant. Two members, representing a majority of the hearing committee, voted to dismiss the matter. All three decisions were tendered to the ISB during the month of May 1997.

18. Rule 509(9) of the Rules of Professional Conduct states:
The grievant and/or the defendant may seek Supreme Court review of a hearing committee decision made pursuant to subsection (5) above. A written petition for such review, stating the reasons for the request, shall be filed with the Clerk of the Supreme Court, within twenty-one (21) days of service of the decision.

19. No appeal to the Supreme Court was filed. Therefore, the decision would have become final no later than July 1, 1997.

20. On June 3, 1998, Jo-Ann L. Bowen, Assistant Bar Counsel, for a third time, now filed a formal Complaint related to those exact same issues that were dismissed in both of the previous proceedings. Appellant did not receive any notice that a formal Complaint would be

filed. (Appendix I)

21. On October 12, 1998, Appellant filed a Motion to Dismiss the Complaint along with a supporting Memorandum with the Professional Conduct Board. The Hearing Committee later requested a Supplemental Memorandum from Appellant. (Appendices J, K, and L)

22. Soon after October 12, 1999, the Hearing Committee ordered Appellant to answer the Complaint before it would consider Appellant's Motion to Dismiss.

23. On November 3, 1998, Appellant appealed this decision to the Idaho Supreme Court.

24. The Supreme Court dismissed said Appeal on January 13, 1999, stating that the Hearing Committee decision was not an appealable order. (Appendix B)

25. On June 7, 1999, the Professional Conduct Board Hearing Committee denied Appellant's Motion to Dismiss. (Appendix C)

26. On July 22, 1999, Appellant filed an Appeal of this decision by the Professional Conduct Board's Hearing Committee.

27. The ISB moved to dismiss this Appeal. On August 31, 1999, Appellant filed an Objection to ISB's motion. See this Objection included in the Appendix.

28. On October 21, 1999, the Idaho Supreme Court dismissed this Appeal. (Appendix M)

28. On October 21, 1999, the Idaho Supree Court dismissed this Appeal. (Appendix A)

ARGUMENT

Before getting into the arguments that are related to the above fact pattern, there are certain preliminary matters that must be dealt with in order to appropriately be able to discuss this case.

1. There is no check and balance system within the disciplinary proceedings conducted by the Idaho State Bar Association. Therefore, licensed attorneys are subject to a Bar Association that has almost unlimited power. In other words, the Bar Association is given the authority to act in multiple capacities without the benefit of appropriate checks and balances. For example, the Idaho State Bar Association is an organization that is created "for the benefit" of Idaho attorneys, funded by the Idaho attorneys, and is supposed to act as the representative of licensed Idaho Attorneys. However, at the same time this organization acts on behalf of its members, it also acts as the police force and as private investigators against the attorneys that it claims to represent. This is a conflict of interest. Said Association brings and pursues disciplinary charges against the same attorneys that it represents. These same Bar Association representatives, in various disciplinary matters, also act as the Judge, Jury, and appellate body. Even in the cases where persons that are not part of the staff of the Bar Association are needed to act as "potential jurors" (as in the circumstance where formal charges are brought against an attorney and a lay person is brought in to be part of the hearing committee) these Bar Association representatives choose the members to be on the panel or "jury" for the disciplinary proceedings. This is done without consulting or often without

reaching an agreement or even considering any criteria that may be important to the charged attorneys. Due process and equal protection both encompass the concepts that the persons being tried and put in jeopardy should have their rights protected and have the opportunity for a fair trial.

The essence of it all is that as attorneys, we did not abrogate or give up our constitutional rights of "due process," "equal protection" or give up the protections against "double jeopardy" just because we took the oath to be licensed as an attorney in the State of Idaho.

2. The second preliminary issue to be addressed here relates to the validity and effect of the Idaho Rules of Professional Conduct. If licensed attorneys are required or even expected to abide by the "letter of the law" as to these Rules of Professional Conduct, then so should the Idaho State Bar Association, the Professional Conduct Board and all of their representatives. It is important that this preliminary concept be made clear that the rules are a two-edged sword. The Professional Conduct Board cannot expect to discipline attorneys for not abiding by these rules if they do not abide by them to the same "letter of the law". This puts the prosecutorial side in a position of advantage over the attorneys they are prosecuting. Such a circumstance violates the due process and equal protection rights of all of the attorneys held hostage under such a system.

3. The constitutional rights enumerated in both the United States Constitution and the State of Idaho

Constitution are clearly as applicable to attorneys as to non-attorneys. This Court has ruled that attorneys have constitutional rights. In the case of Malloy v. Hogan, 378 U.S. 1 (1964), it is made abundantly clear that the Fourteenth Amendment prohibits state infringement upon the basic constitutional rights stated in the United States Constitution. This includes all of the basic and inherent rights in the "Bill of Rights."

> However, the right to practice law is not a matter of grace. We cannot exclude a person from the practice of law for reasons that contravene the due process or equal protection clauses of the United States Constitution.
>
> Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796, 801 (1957).

One of the rights provided by the Fifth Amendment that would be so protected is the right against "double jeopardy." Additionally, Article I Section 13 of the Constitution of the State of Idaho states that "No person shall be twice put in jeopardy for the same offense."

In the case of State v. Sharp, 104 Idaho 691, 662 P.2d 1135 (1965), it was stated:

> The double jeopardy clauses of the fifth amendment, which apply to the states through the fourteenth amendment and of the Idaho Constitution were intended to protect Defendant/Appellants against constant retrials by a state with limitless resources.

An excellent clarification on the meaning of "double jeopardy" is clarified in the 1914 case before the Idaho Supreme Court, State v. Gutke, 25 Idaho 737, 139 P.2d 346, in which the court explained the actions of an Indiana Appellate Court as follows:

> The original opinion in State v. Gapen was based squarely upon the provisions of the Indiana Constitution, which reads as follows: "No person shall be put in jeopardy twice for the same offense." Even under a constitutional provision like this, which is to be found in all the states, the majority of the courts have held to the views we have above expressed. A good illustration of this is to be found in Cook v. State, 43 Tex. Cr. R. 182, 63 S. W. 872, 96 Am. St. Rep. 854. The court, in discussing the question of "once in jeopardy," said: "But where there is one act, one intent, one violation, * * * then appellant cannot be convicted upon an act, intent, and violation for which he has been previously acquitted."

In State v. Gusman, 125 Idaho 810, 874 P.2d 1117 (Ct.App. 1993), the court stated as follows:

> The first issue we address is the jeopardy issue. The Supreme Court in Powell quoted the definition of jeopardy set forth in Breed v. Jones, 421 U.S. 519, 528-29, 95 S.Ct. 1779, 1785, 44 L.Ed.2d 346 (1975), as follows: "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution ... [T]he risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice.'"

Additional clarification comes from the case of State v. Alanis, 109 Idaho 884, 712 P.2d 585 (1985):

> What is an acquittal for double jeopardy purposes has been defined by the United States Supreme Court as "the ruling of a judge, whatever its label, [which] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." United States v. Martin Linen Supply Co., 430 U.S. 564, [109 Idaho 895] 571, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977).

The Idaho Supreme Court Case of State v. Talavera, 127 Idaho 700, 905 P.2d 633 (1995), discusses Idaho's legal position related to "double jeopardy." It states as follows:

> The Double Jeopardy Clause protects against three abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. See, e.g. North Carolina v. Pearce, 395 U.S. 711, 717 [89 S.Ct. 2072, 2076, 23 L.Ed.2d 656] (1969). U.S. v. Halper, 490 U.S. 435, 441, 109 S.Ct. 1892, 1898, 104 L.Ed.2d 487 (1989).

Further, in the case of State v. Byers, 102 Idaho 159, 627 P.2d 788 (1981), the court attempts to relate one of the circumstances when double jeopardy is applicable. In that case the court stated as follows:

> The double jeopardy clause of this section and the Fifth Amendment of the United States Constitution preclude a second trial once a reviewing court has determined that the evidence submitted at trial was insufficient.

Part of the confusion that has existed thus far in connection with

this case related to the previous discussion that it is difficult to ascertain in what capacity any one of the Idaho State Bar Association members is acting in at any specific time. In this case, the Idaho State Bar representative acted as a prosecutor and/or investigator in connection with disciplinary actions. Yet, at still another point, the representative was acting as a judge determining whether complaints against Appellant should be dismissed or whether Appellant should be subject to sanctions. Additional evidence also confirmed that Mr. Grober was operating in a capacity of being judge/jury. Mr. Grober's correspondence of October 26, 1996, indicated that "the following constitutes my findings and disposition in the above-referenced matter." His letter indicated that he understood the allegations of Ms. Perez, that he had reviewed facts and documents, and rendered an opinion that "was subject to appeal" within fourteen days of the receipt of his decision. Obviously, Mr. Grober was acting in the capacity of being a judge, the same as if Mr. Grober had been behind the bench with the robe over his shoulders.

The Idaho Rules of Professional Conduct explain the basic rules that must be followed in this matter. Rule 509 requires that the ISB make a preliminary decision as to the judicial process that they are to follow. It can either be informal pursuant to Rule 509 or formal pursuant to Rule 511. Rule 509 is not, or at least should not be interpreted to allow the ISB one opportunity to prosecute informally, then to pursue a second action informally and a third action formally. Each Rule has its own process on appeal to the hearing committee and then on appeal to the Idaho Supreme Court.

In this case the first time that "jeopardy" occurred is when ISB counsel, Dan Grober, reviewed the facts and rendered his decision

of dismissal. Mr. Grober was acting as the "judge". The evidence that this was a time of "jeopardy" is as follows: 1) if the attorney did not respond to the original complaint, the attorney was informed that sanctions could be imposed; 2) if the decision was not agreed to by either party, that party could "appeal" to a higher source; and 3) a specific time period for appeal is given. In other words, the ISB counsel was "putting on his hat as a judge and rendering a decision that could bring about specific consequences and penalties to Appellant. In fact, at this stage alone, the Appellant could be punished and lose his license to practice law. The second time "jeopardy" occurred is when the hearing committee reviewed the facts and rendered decisions in writing. The hearing committee, according to Rule 509(c)(6) of the Idaho Rules of Professional Conduct, has twenty-one (21) days from the date that the matter is assigned to it to render a decision. In this case the 21 days ended on May 22, 1997. The hearing officers, as representatives of the Idaho State Bar Association, are also subject to the same Idaho Rules of Professional Conduct. So in other words, when the Rules say the decision is to be made in 21 days, we must suppose that the decisions made during this time frame would consist of the decision of this Body. If the rules apply to the Appellant then they certainly should apply to the ISB and the hearing committee.

The only decision lodged within said 21 days was the written decision of the members of the hearing committee. On May 13, 1997, Mr. Kane wrote "I have reviewed the complete file sent by your office in Appeal Case No. 96-033A-Jenkins and hereby notify you that I concur with Bar Counsel's decision to dismiss the matter." On May 19, 1997, Mr. Mossman wrote "Based upon my review of this matter, it is my individual decision to approve the Bar Counsel's Disposition of this case." On May 16, 1997, a let-

ter was received by the ISB from Mr. Lucas asking some questions, but not giving a final decision. Claudia Kopper, the Clerk for the Professional Conduct Board, had received all of said letters by June 10, 1997.

According to Rule 509(c)(5) the hearing committee only has the four choices:

(A) approve Bar Counsel's disposition; or
(B) reject Bar Counsel's disposition; or
(C) modify Bar Counsel's disposition; or
(D) recommend the filing of formal charges.

The decision had been rendered with a majority deciding to "approve the Bar Counsel's disposition" or in other words, dismiss the complaint against Appellant. At this point jeopardy had again attached and the only alternative left for either party to the action was if a timely appeal had been taken to the Idaho Supreme Court.

In order to take an appeal to the Idaho Supreme Court Rule 509(c)(9) says that "A written petition for such review, stating the reasons for the request, shall be filed with the Clerk of the Supreme Court, within twenty-one (21) days of service of the decision." No appeal to the Idaho Supreme Court was filed by either party to this action.

Instead, on June 3, 1998, (over a complete year after the previous letters had been sent by the hearing committee members) a formal complaint pertaining to the same matters and issues as originally filed in the Nicholasa Perez matter was filed before the Professional Conduct Board of the ISB. The complaint filed was for the exact same reason as the complaints stated in the Dan Grober letter to Gordon Jenkins on April 17, 1996. The com-

plaint filed June 3, 1998, constitutes double, if not triple, jeopardy and has been filed in violation of the "due process" rights of Appellant and should be dismissed. Although it was submitted under the "guise" of a late appeal, in reality, the filing of a formal complaint consisted of a second or third filing for exactly the same charges that had been dismissed twice previously. This can be clearly seen by comparing the letter of April 17, 1996, of Dan Grober to the formal complaint that was filed on June 3, 1998.

Attorney discipline matters are judicial in nature, not administrative. Idaho State Bar v. Jenkins, 120 Idaho 379, 816 P.2d 335 (1991). The attorney discipline proceedings are quasi-criminal in nature. Often, the double jeopardy clause has been attempted to be used to prevent a person who has been convicted of a crime before a criminal court from also being disciplined by the local bar association. Most of these cases have not been successful because the court's have made it clear that there is a distinction between the "criminal charges" and those "professional conduct charges." Therefore, because of the desire of protecting the public the courts have largely deemed that such situations are not double jeopardy.

However, in this case, Appellant was charged in the first action with a disciplinary violation. This action was dismissed and the decision became final when the appeal time ran. The Defendant was then charged a second time, with what was referred to as a late appeal to the hearing committee, which committee also agreed to dismiss the charges. This second charge was based upon the same facts and elements as the first. The purpose of this second charge, i.e. attorney discipline, was also the same. The filing of the third or formal complaint was also based upon the same facts and elements, and for the same purpose, as the first two

complaints. All three matters are identical. Therefore, double jeopardy would be applicable in this circumstance, as opposed to the circumstance where an attorney is first convicted criminally and then argues double jeopardy in the attorney discipline action. This position is supported by the writings of Charles Frank Reavis, Sr., Professor of Law at Cornell University. In his treatise, "Modern Legal Ethics", on page 115 he states, "A final resolution on prior charges in another disciplinary action will preclude new charges only if the same occurrence is alleged and the same relief sought." This is precisely what has occurred here.

The State Bar should be precluded from trying these same issues again and again. The principles of "Double Jeopardy", "Res Judicata" or "Collateral Estoppel" should bar ISB from having a third try, all at Appellant's expense. After a specified period of time (the appeal time specified in the Rules) Appellant should not have to suffer continued and repeated prosecution for the same conduct.

Therefore, Appellant hereby respectfully requests that the United States Supreme Court grant Appellant's Petition for Writ of Certiorari.

DATED This 12 day of ~~January~~ April, 2000.

Gordon W. Jenkins

Gordon W. Jenkins

Appendix

Appendix A — Order of the Supreme Court of Idaho dated October 21, 1999

IN THE SUPREME COURT OF THE STATE OF IDAHO

ORDER NO. 25727, Ref. No. 99S-213

DEFENDANT A, Petitioner,

v.

IDAHO STATE BAR, Respondent.

IN THE MATTER OF THE PETITION FOR REVIEW OF THE DECISION OF THE PROFESSIONAL CONDUCT BOARD.

A MOTION TO DISMISS AND MOTION FOR SANCTIONS with supporting AFFIDAVIT with attachments was filed by Respondent July 27, 1999. An OBJECTION TO PLAINTIFF 'S MOTION TO DISMISS was filed by Petitioner September 2, 1999. The, Court is fully advised; therefore after due consideration,

IT IS HEREBY ORDERED that Respondent's MOTION TO DISMISS be, and hereby is GRANTED and this appeal is hereby DISMISSED.

IT IS FURTHER. ORDERED that Respondent's MOTION FOR SANCTIONS be, and hereby is, DENIED.

DATED this 21st day of October, 1999.

By Order of the Supreme Court

s/Lois Dawson
Lois Dawson Chief Deputy Clerk, for
Frederick C. Lyon, Clerk

cc: Counsel of Record

Appendix B — Order Dismissing Appeal of the Supreme Court of Idaho dated January 13, 1999

IN THE SUPREME COURT OF THE STATE OF IDAHO

ORDER DISMISSING APPEAL NO. 25095, Ref. No. 98S-291

IDAHO STATE BAR, Plaintiff-Respondent,

v.

GORDON W. JENKINS, Defendant-Appellant.

An ORDER CONDITIONALLY DISMISSING APPEAL was issued November 6, 1999 for the reason it appeared this appeal was not from an appealable order or judgment but allowed Appellant to file a response by December 28, 1998. A RESPONSE TO COURT CLERK DETERMINATION OF 11-6-98 was filed by Appellant December 16, 1998. Therefore, after due consideration,

IT IS HEREBY ORDERED that the ORDER CONDITIONALLY DISMISSING APPEAL be, and hereby is, AFFIRMED and this appeal is DISMISSED as this Court will not review Bar disciplinary proceedings until the matter is properly brought before the Court.

DATED this 13th day of January, 1999.

By Order of the Supreme-Court

s/Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record

Appendix C — Memorandum Decision and Order dated July 2, 1999

Professional Conduct Board
Idaho State Bar
July / Jun 07 1999
Filed - Original

BEFORE THE PROFESSIONAL CONDUCT BOARD OF THE IDAHO STATE BAR

MEMORANDUM DECISION AND ORDER, Case No. 98-003

IDAHO STATE BAR, Plaintiff,

v.

GORDON W. JENKINS, Defendant.

Defendant, Gordon Jenkins filed his Motion to Dismiss, the parties have submitted briefing, oral argument and supplemental briefing. The hearing committee has fully considered these submittals and renders the following decision.

The Motion to Dismiss was predicated on several grounds, including:

Due process of law
Double jeopardy
Res Judicata
Jurisdictional effect of IBCR 509

The hearing committee will discuss each of these in the order listed above.

Appendix C

I.

STANDARD APPLICABLE TO MOTIONS TO DISMISS

When this Board considers a motion to dismiss it must consider the allegations of the complaint as if they were true. Boesiger v. DeModena, 88 Idaho 337, 399 P.2d 635 (1965). If the movant presents affidavits, or other evidence, the motion shall be considered as a summary judgment motion. See, e.g., I.R.C.P. 12(c). Mr. Jenkins has submitted evidence with his motion and it will therefore be considered as a motion for summary judgment. The Board will therefore, consider the evidence in the light most favorable to the non movant, giving all inferences to the non movant. Student Loan Fund of Idaho, Inc. v. Duerner, 131 Idaho 45, 491 951 P.2d 1272 (1977).

II.

DUE PROCESS Of LAW

The evidence shows that a complaint was lodged with the Idaho State Bar by Nicholassa Perez. That complaint was considered by assistant bar counsel and dismissed. Ms. Perez then filed an untimely appeal of the dismissal. Two of the hearing committee members wrote to the clerk of the PCB stating that they would vote to sustain the bar counsel's dismissal. The third member of the committee wrote to the clerk asking that additional information be obtained, by assistant bar counsel. After a conference among the hearing committee members, the hearing committee remanded the matter back to assistant bar counsel to conduct further investigation. Mr. Jenkins maintains that the filing of the formal charge complaint after remand violated his rights to due process of law guaranteed by the fifth and fourteenth amendments to the United States Constitution.

First of all, the Hearing Committee has the power to reject bar counsel's recommendation. IRPC 503(b)(3). A request for further investigation is simply that.

A dismissal of a complaint by assistant bar counsel under authority of IRPC 509 does not give rise to rights of the complainant or the accused attorney to due process. Matter of Malmin, 126 Idaho 1024, 1029, 895 P.2d 1217 (1995), (private reprimand does not trigger right to procedural due process). The filing of the untimely appeal will be addressed below. However, let it suffice to say that neither such filing nor a remand to assistant bar counsel for additional investigation gives rise to procedural due process protections. Finally, the filing of a formal charge complaint does indeed require due process protections, Idaho State Bar v. Gordon W. Jenkins, 127 Idaho 408, 414, 901 P.2d 1309 (1995), but it has not been argued that the rules do not provide for such protections, or that the committee is not involved in providing Mr. Jenkins his procedural due process as this motion and other matters are being considered in this formal charge proceeding.

III.
DOUBLE JEOPARDY

Mr. Jenkins argues that since the complaint originally filed by Nicholassa Perez was once considered and dismissed by assistant bar counsel, to now consider the formal charge complaint, which arose out of the original complaint filed by Ms. Perez, causes Mr. Jenkins to be twice placed in jeopardy for the same offense in violation of the Fifth Amendment to the United States Constitution.

The double jeopardy clause does not apply in this case for bar disciplinary proceedings do not impose punishment. See Matter of Caranchini, 160 F.3d 420 (8th Cir. 1998). Instead, "attorney discipline is designed to protect the public and is therefore remedial in nature". Id. at 424. See also Matter of Tway, 123 Idaho 59, 844 P.2d 688 (1992); In re Brown, 906 P.2d 1184 (Cal. 1995). Perhaps the best statement of the rationale of this decision is contained in the opinion of the Colorado Supreme Court in People v. Marmon, 903 P. 2d 651 (Colo. 1995). That court said:

> In a lawyer discipline case "where the respondent has already been punished by the criminal justice system, our aim in determining the level of discipline is not retribution, but the protection of the public." People v. Martin 897 P. 2d 802, 804 (Colo. 1995). In determining the proper disposition, therefore, our analysis begins and ends with the disciplinary sanction necessary to protect the public, mid thus is not punishment for double jeopardy purposes. A contrary conclusion would lead to the absurd result that lawyers convicted of criminal offenses never be disciplined.

People v. Marmon, 903 P.2d 651 (Colo. 1995).

IV.
RES JUDICATA

During oral argument the hearing committee raised the issue of res judicata, asking that the parties submit supplemental briefing on the applicability of the doctrine in this case. The hearing committee is convinced the doctrine does not apply, since the dismissal of the complaint by assistant bar counsel did not constitute an adjudication of the issues set forth in the formal charge complaint. See Restatement (Second) of Judgments, Section 83(2), The Restatement (Second) of Judgments was adopted in Idaho in Aldape v. Akins, 105 Idaho 254, 668 P.2d 130 (Ct. App. 1983).

V.
JURISDICTIONAL EFFECT OF IRPC 509

Mr Jenkins also aria the IRPC 509 requires that an appeal from a dismissal by assistant bar counsel be filed, if at all. within 14 days of the notice of dismissal. In this case the appeal was admittedly filed several months after the notice of dismissal. Although Mr. Jenkins cites a number of cases for the proposition that a timely notice of appeal is jurisdictional, he fails to note the difference between the Idaho Appellate Rules and the IRPC In particular,

Appendix C

IRPC 522(b) states:

> (B) Time Requirements. Except as otherwise provided in these Rules, the time in which any act or any thing is to be done or performed is not jurisdictional.

In addition. Mr. Jenkins has failed to show that he has been prejudiced in any relevant way by the late filing of the appeal.

VI.
ORDER

Based on the foregoing decision, IT IS HEREBY ORDERED AND THIS DOES ORDER that Defendant's Motion to Dismiss is denied.

DATED this 2nd day of July, 1999.

By s/Phillip S. Oberrecht
Phillip S. Oberrecht, Chairman
Hearing Committee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of July, 1999, I caused to be served a true, copy of the foregoing MEMORANDUM, DECISION AND ORDER, by the method indicated below, and addressed to each of the following:

Gordon W. Jenkins	X U.S. Mail, Postage Prepaid
Jenkins Law Office	_ Hand Delivered
2595 Channing Way	_ Overnight Mail
Idaho Falls, ID 83404	_ Telecopy

Jo-Ann L. Bowen Assistant Bar Counsel Idaho State Bar P.O. Box 895 Boise, ID 83 701	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telécopy
Lynn Melton 3939 Brookside Lane Boise, ID 83703	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy
Robert D. Lewis Cantrill, Skinner, Sullivan & King P.O. Box' 3 59 Boise, ID 83701	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy
Claudia Kopper Idaho State Bar Professional Conduct Board 525 West Jefferson Boise, ID 83702	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy

s/Claudia Kopper
Claudia Kopper

Appendix D — Letter dated October 29, 1998

Idaho State Bar
525 West Jefferson P. 0. Box 895 Boise, Idaho 83701
PH: (208) 334-4500 FAX: (208) 334-4515

RETURN RECEIPT REQUESTED
CERTIFIED NO. P 070 706 037 and P 070 706 038

October 29, 1996

PERSONAL AND CONFIDENTIAL

Gordon W. Jenkins
Jenkins Law Office
2595 Channing Way
Idaho Falls, ID 93404

Nicholasa Perez
2449 Sundance Road
American Falls, ID 83211

RE: Grievance against Gordon W. Jenkins
ISB File No. 96-033

Dear Mr. Jenkins:

The following constitutes my findings and disposition in the above-referenced matter.

Nicholasa Perez alleges Idaho Falls attorney Gordon W. Jenkins violated three rules of professional conduct in his handling of her case following an automobile accident.

Jenkins' written response and attached specifically addresses each allegation. Based thereon, no violations are apparent.

Based upon the foregoing, this matter is DISMISSED.

Either party may seek review of this decision by filing a written request with the Clerk of the professional Conduct Board, Idaho State Bar, P. 0. Box 995, Boise, Idaho 83701, within fourteen (14) days of receipt of this decision. The written request should specify the reason(s) for seeking review. Furthermore, a copy of the request for review must be provided to the undersigned, as well as to the opposing party.

If a written request for review is filed, the matter will then be assigned to a Hearing/Review Committee. The Committee will decide the matter on the record, unless either party requests a hearing. If a hearing is desired, it should be requested in the written request for review. the (SIC) Committee will have ten (10) days following the date the matter is finally submitted in which to render its decision.

Sincerely,

s/Dan C. Grober
Dan C. Grober
Assistant Bar Counsel

DCG/sn

Appendix E — Notice of Assignment of Committee dated May 1, 1997

PROFESSIONAL CONDUCT BOARD
P.O.Box 895
Boise, ID 83701

BEFORE THE HEARING COMMITTEE OF THE PROFESSIONAL CONDUCT BOARD OF THE IDAHO STATE BAR

NOTICE OF ASSIGNMENT OF COMMITTEE,
Case No. 96-033a

in the matter of:

GORDON W. JENKINS,
Attorney at Law.

Pursuant to Rule 509(c)(3) of die Rules for Review of Professional Conduct, along with the approval of the Idaho Supreme Court, this matter is hereby assigned to a Hearing Committee consisting of Michael Kane (Chair), Hugh Mossman and Larry Lucas.

DATED this 1st day of May, 1997.

PROFESSIONAL CONDUCT BOARD

Phillip S Obberrecht - -
mailed without signiture
to avoid delay

PHILLIP OBERRECHT, CHAIRMAN

Appendix F — Letter dated May 13, 1997

ANDERSON KANE & TOBIASON, CHTD.
Jefferson Place Building
350 N. 9th Street, Suite 201
P.O. Box 2865
Boise, Idaho 83701-2865
Telephone 208-342-4545
Facsimile 208-342-2323
Steven J. Tobiason
Michael J. Kane
Terry B. Anderson

May 13, 1997

RECEIVED
May 15, 1997
IDAHO STATE BAR

Claudia Kopper
Idaho State Bar
P.O. Box 895
Boise, ID 83701

Re: Appeal Case No. 96-033A-JENKINS

Dear Ms. Kopper:

I have reviewed the complete file sent by your office in Appeal Case No. 96-033A-JENKINS and hereby notify you that I concur with Bar Counsel's decision to dismiss the matter.

Yours very truly,

s/Michael Kan
Michael Kane

Mk:jk

Appendix G — Letter dated May 19, 1997

Hugh Mossman
Attorney at Law
611 West Hays Street, Boise, Idaho 83702
800-501-6900 208-342-6900 208-343-5791

RECEIVED
May 20, 1997
IDAHO STATE BAR

May 19, 1997

Claudia Kopper
Idaho State Bar
P. 0. BOX 895
Boise, Idaho 83701

Re: Appeal Case No. 96-033A-JENKINS

Dear Claudia:

I have now had the opportunity to thoroughly review the materials forwarded to my office in the above-referenced matter which I received on May 6, 1997.

Based -upon my review of this matter, it is my individual decision to approve the Bar Counsel's disposition of this case. If further information or input in required, please advise me.

Sincerely,

s/Hugh Mossman
Hugh Mossman

HM/mw

Appendix H — Letter dated May 16, 1997

Fifth & Jefferson St.
Post Office Box 92
Moscow, Idaho 83843

208/882-9504
FAX: 208/882-9503

RECEIVED
May 16, 1997
IDAHO STATE BAR

Lucas Company Certified Public Accounting

Claudia Kopper
Idaho State Bar.
525 West Jefferson
P.0. Box 895
Boise, ID 83701

Re: Professional Conduct Board disposition of the matter of Gordon W. Jenkins

Dear Claudia,

I have reviewed the documentation you sent In the above matter and have concluded:

1. Ms. Perez maintains that she was told by a representative of West One Bank that the account on which the settlement check was written had insufficient funds to allow the bank to honor It. This has not been rebutted. Whether there were sufficient funds or not has not been established. We have I a copy of a check dated 4/11/96 and a toner confirming adequate funds on 4114/96. I would be satisfied that Mr Jenkins adequately protected the funds of Ms. Perez If the balance In this account was shown to have never dipped below

$6,710.67 from the time of Issuance until the time the check was honored.

2. My copy of the retainer agreement does not contain the signature of Ms. Perez. I trust this is a copying error, being unwilling to ascribe to Mr. Jenkins the brazenness necessary to provide a copy without. signature, as though it had one. Please reassure me that bar counsel's records contain the agreement with the signature. If you're unable to do so, I'll need to consider the retainer agreement charge unsuccessfully rebutted as well.

3. Regarding the attorney's obligation to keep clients advised of the status of their lawsuit, Mr. Maguire bases his conclusion on the assertion that during the 14 months Ms. Perez was unable to discuss her case with Mr. Jenkins. Mr. Jenkins does not refute this. I'm unsure what the standard is here. Can an attorney keep a client advised and yet never discuss the case with the client?

4. Regarding the amount and finality of the settlement, the summary form prepared by Jenkin's office seems *quasi*-clear to me, but then I'm an English-speaking CPA.

Please let me know where we go from here.

With best regards,

s/Larry
Lawrence R. Lucas

Appendix I — Complaint dated June 3, 1998

Jo-Ann L. Bowen
Assistant Bar Counsel
Idaho State Bar
P.O. Box 895
Boise, ID 83701
(208) 334-4500

BEFORE THE PROFESSIONAL CONDUCT BOARD
OF THE IDAHO STATE BAR

IDAHO STATE BAR,

Plaintiff

v

GORDON W. JENKINS'

Defendant

COMPLAINT, Case No. FC 98-003

The Idaho State Bar (ISB), by and through its counsel, Jo-Ann L. Bowen, charges Gordon W. Jenkins, an attorney admitted to practice before the courts of Idaho, with professional misconduct as follows:

COUNT ONE (Misappropriation of Funds)

1. Defendant, Mr. Jenkins, was admitted to the practice of law in the State of Idaho in 1981, at which time he took the oath required for admission. In that oath, Mr. Jenkins agreed to abide by and follow the Rules of Professional Conduct as adopted and amended by the ISB and the Rules of the Idaho Supreme Court. At all times mentioned in this Complaint, Mr. Jenkins has continuously been under the jurisdiction of the Idaho Supreme Court as a member of the ISB on active status.

2. The Supreme Court of the State of Idaho has approved and

adopted the Idaho Rules of Professional Conduct, governing the ethical conduct of attorneys licensed to practice in the State of Idaho. The *Idaho Rules of Professional Conduct* have been in effect at all times relevant to this Complaint.

3. Pursuant to Rule 511(a)(1) of the Idaho Bar Commission Rules, the Board of Commissioners has concurred in the filing of these charges against Mr. Jenkins.

4. In 1994 and 1995, Mr. Jenkins represented Nicholasa Perez in connection with a personal injury claim. Mr. Jenkins settled Ms. Perez's personal injury claim, and on January 9, 1995, the insurer for the tortfeasor issued a settlement check in the amount of $31,573.85.

5. On April 11, 1995, Mr. Jenkins issued a check to Ms. Perez in the amount of $6,710.67 drawn on his client trust account #0075001541 at U.S. Bank (f/k/a/ West One Bank) (hereinafter "the April 11, 1995 check").

6. The April 11, 1995 check was supposed to represent monies owed by Mr. Jenkins to Ms. Perez from the settlement of her personal injury claim.

7. On April 11, 1995 and thereafter until April 14, 1995, there were insufficient funds in Mr. Jenkins' trust account to cover the April 11, 1995 check. There were insufficient funds in Mr. Jenkins' trust account to cover the April 11, 1995 check because Mr. Jenkins misappropriated settlement funds belonging to Ms. Perez.

8. The conduct described in paragraphs 4 through 7 of Count One constitutes a violation of Rules 1.15 and 8.4 of the *Idaho Rules of Professional Conduct.*

Appendix I

COUNT TWO (Failure to Disclose Trust Account and Authorize Reporting of Overdrafts)

1.- 6. Plaintiff repeats and realleges, as if fully set forth here, paragraphs 1 through 6 of Count One as paragraphs 1 through 6 of Count Two.

7. On December 21, 1994, Mr. Jenkins signed his 1995 Trust Account Certification. Mr. Jenkins submitted his 1995 Trust Account Certification to ISB pursuant to Rule 1.15 of the *Idaho Rules of Professional Conduct* and Rule 302 of the *Idaho Bar Commission Rules.*

8. In his 1995 Trust Account Certification, Mr. Jenkins listed his client trust accounts; certified, under penalty of perjury, the accuracy of his list of client trust accounts; and authorized the automatic reporting to ISB of overdrafts in the listed trust accounts.

9. In his 1995 Trust Account Certification, Mr. Jenkins failed to list his client trust account #0075001541 at U.S. Bank (f/k/a/ West One Bank) and failed to authorize the automatic reporting of overdrafts in that client trust account.

10. The conduct described in paragraphs 4 through 9 of Count Two constitutes a violation of Rules 1.15 and 8.4 of the *Idaho Rules of Professional Conduct* and Rule 302 of the *Idaho Bar Commission Rules.*

COUNT THREE (Misrepresentations to Bar Counsel)

1.- 7. Plaintiff repeats and realleges, as if fully set forth here, paragraphs I through 7 of Count One as paragraphs I through 7 of Count Three.

8. On January 31, 1996, Attorney David Maguire, on behalf of Ms. Perez, filed a grievance with ISB against Mr. Jenkins alleg-

ing, *inter alia*, that when Ms. Perez tried to cash the April 11, 1995 check, a number of different times, she was unsuccessful because there were insufficient funds in Mr. Jenkins' client trust account to cover the check.

9. By a letter dated April 17, 1996, disciplinary counsel for ISB (collectively and individually referred to herein as "Bar Counsel") asked Mr. Jenkins to respond to the allegation that he "provided a settlement check to [Ms. Perez] that could not be cashed due to having insufficient funds in the trust account in violation of Rule 1.15."

10. By a letter to Bar Counsel dated May 23, 1996, Mr. Jenkins asserted that the April 11, 1995 check was not an insufficient funds check and that the balance in his client trust account considerably ex ceeded the amount needed to cash the April 11, 1995 check.

11. By a letter to Bar Counsel dated May 23, 1996, Mr. Jenkins explained that the bank would riot cash the April 11, 1995 check for Ms. Perez because of "questions by the bank relative to such a large check being cashed for 'cash' and questions by the bank relative to [Ms. Perez's) identification."

12. By a letter to Bar.. Counsel dated May 23, 1996, Mr. Jenkins explained that the only reason the April 11, 1995 check could clear within one hour from contact with Mr. Jenkins was because "the bank in American Falls would not cash the check until they had specifically checked with [him] to make sure it was okay to give these people cash."

13. In his letter to Bar Counsel dated May 23, 1996, Mr. Jenkins attributed the problems Ms. Perez encountered in cashing the April 11, 1995 check to a bank practice in the area where the bank would check with the issuer of large check before cashing it, especially in the case of Spanish speaking people, out of concern about the use of illegal documents, social security numbers and dri-

ver's licenses.

14. Mr. Jenkins' assertions and explanations in his letter to Bar Counsel dated May 23, 1996 with respect to the April 11, 1995 check and the problems Ms. Perez encountered in cashing the April 11, 1995 check were false, and Mr. Jenkins knew they were false.

15. The conduct described in paragraphs 8 through 14 of Count Three constitutes a violation of Rules 8.1 and 8.4(c) of the Idaho Rules of Professional Conduct.

WHEREFORE , based on the matters alleged in Counts One, Two, and Plaintiff prays for judgment against Defendant, Gordon W. Jenkins, as follows:

That Defendant be disbarred; that he be ordered to pay the costs and expenses incurred in investigating and prosecuting this matter; and for such other relief as is deemed necessary and proper.

DATED this 3rd day of June, 1998.

IDAHO STATE BAR
s/Jo-Ann L. Bowen
Jo-Ann L. Bowen
Assistant Bar Counsel

Appendix I

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 1998, I served a true and correct copy of the foregoing COMPLAINT upon the following by certified mail, return receipt requested, addressed and directed as follows:

Gordon W. Jenkins
Jenkins Law Office
2595 Channing Way
Idaho Falls, ID 83404

s/Jo-Ann L. Bowen
Jo-Ann L. Bowen

Appendix J — Defendant's Motion to Dismiss dated October 12, 1998

Gordon W. Jenkins
JENKINS LAW OFFICE
2595 Channing Way
Idaho Falls, ID 83404
Telephone: (208) 524-2650
Facsimile: (208) 524-2760

BEFORE THE PROFESSIONAL CONDUCT BOARD OF THE IDAHO STATE BAR ASSOCIATION

Defendant's Motion to Dismiss, ISB File No.: 98-003

Idaho State Bar,

Plaintiff

v.

Gordon W. Jenkins,

Defendant

TO: **THE CLERK OR SECRETARY OF THE PROFESSIONAL CONDUCT BOARD FOR THE IDAHO STATE BAR ASSOCIATION.**

COMES NOW the Defendant, Gordon W. Jenkins and moves the Professional Conduct Board to dismiss the attached complaint filed before Professional Conduct Board of the State of Idaho on the 3rd day of June, 1998.

These matters all pertain to complaints lodged with the Idaho State Bar by one Nicholasa Perez. Nicholasa Perez during all of time of these matters was represented by David Maguire, Esq. of Pocatello, Idaho.

The reason for this Motion for Dismissal is that the complaint filed before the Professional Conduct Board consists of an illegal com-

plaint that has been filed in direct violation of the defendant's constitutional rights as they are enumerated in the Constitutions of the Untied States and the State of Idaho. The defendant's rights being specifically vi matters contined and filed in said Idaho Professional Conduct Board Complaint relate to those same matters that on two prior occasions had been filed by way of complaints with the Idaho State Bar. These matters were dismissed on two prior occasions by decisions from the prosecuting body. No appeal of said decisions was timely taken. The present complaint before the Professional Conduct Board is directly in violation of the Defendant's right against double jeopardy and due process under the law.

As a result of said complaint having been filed illegally in violation of defendant's rights, the defendant herein respectfully requests that the present complaint be dismissed.

DATED This 12th day of October, 1998.

JENKINS LAW OFFICE

s/Gordon W. Jenkins
Gordon W. Jenkins

Appendix J

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 12th day of October, 1998, I caused a true and correct copy of the foregoing DEFENDANT'S MOTION TO DISMISS to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

Ms. Jo-Ann L. Bowen, Esq.	[X] Mailing
IDAHO STATE BAR ASSOCIATION	[ ] Hand Delivery
P.O. Box 895	[X] Facsimile
Boise, ID 83701	

s/Gordon W. Jenkins
Gordon W. Jenkins

Appendix K — Memorandum in Support of Defendant's Motion to Dismiss dated October 12, 1998

Gordon W. Jenkins
JENKINS LAW OFFICE
2595 Channing Way
Idaho Falls, ID 83404
Telephone: (208) 524-2650
Facsimile: (208) 524-2760

BEFORE THE PROFESSIONAL CONDUCT BOARD OF THE IDAHO STATE BAR ASSOCIATION

Memorandum in Support of Defendant's Motion to Dismiss,
ISB File No.: 98-003

Idaho State Bar,

Plaintiff

v.

Gordon W. Jenkins,

Defendant

TO: THE CLERK OR SECRETARY OF THE PROFESSIONAL CONDUCT BOARD FOR THE IDAHO STATE BAR ASSOCIATION.

COMES NOW the Defendant, Gordon W. Jenkins and provide his MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS in support of the Motion to Dismiss that is attached hereto. Based upon these documents the Defendant moves that the Professional Conduct Board to dismiss the attached complaint filed before Professional Conduct Board of the State of Idaho on the 3rd day of June, 1998.

Statement of Facts

The matters in the complaint filed before the Professional Board of

Conduct pertain to complaints lodged with the Idaho State Bar (ISB) by Nicholasa Perez against the Defendant. Ms. Perez during all of these proceedings was represented by David Maguire, Esq., an attorney in Pocatello, Idaho.

The reason for this Motion for Dismissal is that the matters filed in the formal complaint before the Idaho Professional Conduct Board are the same that were previously filed and dismissed on two prior occasions in proceedings before the ISB. The ISB in filing said previous complaint was acting under the authority of The Professional Conduct Board of the State of Idaho and the Idaho Supreme Court. The subsequent filing of the formal complaint before The Professional Conduct Board of the State of Idaho is an act in violation of the defendant's constitutional rights of due process and right against double jeopardy.

The original complaint was filed pursuant to the Idaho Bar Commission Rules, Rule 509(a) and (b). The letter of complaint was listed as being a Grievance by Nicholasa Perez, ISB File No. 96-033 (See Attached Exhibit "A"). The document in Exhibit A constituted an informal complaint that had penalties that could be assessed, the right of appeal to a hearing committee, and a second right of appeal to the Supreme Court of the state of Idaho. This complaint consisted a "quasi-criminal" action with consequences attached to it in the event the defendant did not respond. In fact, the letter of complaint was directly from the ISB in a capacity of acting as a judge or reviewing officer related to the matter. It made no reference to the claim still being in the investigation status, and made no reference that after if the Defendant did not respond a "complaint" would be filed. Instead, it clearly stated that in the event no response was received "Your failure to respond to this grievance may result in imposition of sanctions pursuant to Idaho Bar Commission Rule 505(e)." As such, the matter was clearly a "quasi-criminal" action against the Defendant.

The nature of the action (i.e. of being a quasi criminal complaint)

is further substantiated by Rule 509(a) that specifically spells out the procedure or options that can be selected after conducting an investigation. One option is to pursue an action under Rule 511 that is to "File formal charges, with concurrence of the Board of Commissioners." Six other options are mentioned with decision alternatives ranging from the dismissal of the claim to the imposition of sanctions. Rule 509 gives the ISB the opportunity of choosing which process it would prefer to take-whether it files a formal complaint or proceeds with the Rule 509 procedure. The processes stated in Rule 509 do not indicate that the ISB has the right to ignore the Constitutional rights of the party being charged.

The rule only offers alternative procedures that can be selected or followed in that the ISB can choose to proceed under Rule 509 (a more informal proceeding) or under Rule 511 (more formal proceedings). Whether the ISB chooses to continue proceeding under Rule 509 or Rule 511, both Rules have their own Review and Appeal procedures that allow the proceeding to be reviewed by a "hearing committee" and then heard by the "Idaho Supreme Court" if necessary.

In this case, after the initial investigation was completed, the ISB elected to continue its proceedings under Rule 509. The complaint was then assigned the ISB 96-033 and was sent to the defendant. The defendant responded to said complaint.

On October 29, 1996, a decision was issued dismissing the grievance filed against the defendant. The Notice of the Dismissal was sent to the complaining party, Nicholas Perez and her attorney, David MaGuire. Said Notice of Dismissal specifically indicated that the charges against the above Defendant had been dismissed and designated a specific time period in which an appeal of said decision could be filed. (Again, the fact that an appeal time was given is evidence of this matter being a quasi-criminal complaint). Even though Ms. Perez was represented by legal counsel, no timely appeal was made.

Rule 509(a) indicates that the time period to request a review was fourteen days. Since no timely appeal was made, the previously stated decision to dismiss became final fourteen days later on November 12, 1996.

On February 24, 1997 long after the prior decision had become final, Ms. Perez found "another sympathetic ear" in the way of friend who wrote the ISB for Nicholas Perez again complaining of the matters that she had originally complained of and which resulted in the original complaint against defendant. Ms. Perez through the writing of her friend indicated that the reason she was late in filing what she wanted to classify as a request for an appeal was because she could not find anyone to translate for her. Said statement is false in that she obviously had not only an attorney that was representing her, but also has two teenage children who live with her that attend junior high and high school in the American Falls school system. Both speak excellent English.

After the ISB received said second letter from Ms. Perez, the ISB presented the charge a second time. This time is was described as a Notice of Assignment of Committee or an appeal of the prior charge as is described in the notice dated May 1, 1997 from the ISB to the defendant. Said notice indicated that the charges "Pursuant to Rule 509(c)(3) of the Rules for Review of Professional Conduct, along with the approval of the Idaho Supreme Court, this matter is hereby assigned to a Hearing Committee consisting of Michael Kane (Chair), Hugh Mossman and Larry Lucas."

Said charges against defendant were presented to the hearing committee. Although this stage represented a "double jeopardy" of the prior charges, the hearing committee reviewed the information and made a decision.

Rule 509(c)(5) states as follows:
Decision. The hearing committee, following its review may:

(A) approve Bar Counsel's disposition; or

(B) reject Bar Counsel's disposition; or
(C) modify Bar Counsel's disposition; or
(D) recommend the filing of formal charges.

The decision letters of the members of the hearing committee are attached hereto as Exhibit B. The decision was in favor or the defendant. Two members, representing a majority of the hearing committee, voted to dismiss the matter (See attached Exhibit C). All three decisions were tendered to the ISB during the Month of May 1997.

Based upon the decisions rendered by the Hearing Committee, Rule 509(c)(6) gives the ISB 21 days to file and appeal to the Idaho Supreme Court. Rule 509(9) of the Rules of Professional Conduct states "The grievant and/or the defendant may seek Supreme Court review of a hearing committee decision made pursuant to subsection (5) above. A written petition for such review, stating the reasons for the request, shall be filed with the Clerk of the Supreme Court, within twenty-one days of service of the decision." No appeal to the Supreme Court was filed. Therefore, the decision would have become final no later than July 1, 1997.

On June 3, 1998, Jo-Ann L. Bowen, Assistant Bar Counsel filed a formal complaint related to those same issues that were dismissed in both of the previous proceedings.

Argument

The constitutional rights pertaining to both the United States Constitution and the State of Idaho Constitution are clearly as applicable to attorneys as non-attorneys. It has been clearly ruled by the Supreme Court of the United States that even attorneys have constitutional rights. In the Case of Malloy v. Hogan, 378 U.S. 1, (1964) it is made abundantly clear that the Fourteenth Amendment prohibit state infringement upon the basic constitutional rights stated in the United States Constitution.

This matter is also reviewed by the Supreme Court of the State of Idaho which states as follows:

> "However, the right to practice law is not a matter of grace. We cannot exclude a person from the practice of law for reasons that contravene the due process or equal protection clauses of the United States Constitution. Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796, 801, (1957);"

One of the rights provided by the Fifth Amendment that would be so protected in the right against "double jeopardy." In Article I Section 13 of the Constitution of the State of Idaho states that "No person shall be twice put in jeopardy for the same offence."

In the case of State v. Sharp, 104 Idaho 691, 662 P.2d 1135 (1965) it was stated as follows:

> "the double jeopardy clauses of he fifth amendment, which apply to the states through the fourteenth amendment and of the Idaho Constitution were intended to protect defendants against constant retrials be a state with limitless resources."

Further, in the case of State v. Byers, 102 Idaho 159, 627 P.2d 788 (1981) the court states as follows:

> "The double jeopardy clause of this section and the Fifth Amendment of the United States Constitution preclude a second trial once a reviewing court has determined that the evidence submitted at trail was insufficient."

Part of the confusion with the Idaho Bar Commission Rules is that it is difficult to ascertain what the capacity of the ISB is as it relates to any certain attorney at any given time. At one point, the ISB is the representative of the attorney acting as his representative to the Idaho Legislature, etc. At another point, the ISB is acting as a pros-

ecutor in connection with disciplinary actions. Yet, at still another point, the ISB is acting as a judge determining whether a complaint against an attorney should be dismissed.

Rule 509 requires that the ISB make a preliminary decision as to the judicial process that they are to follow. It can either be informal pursuant to Rule 509 or formal pursuant to Rule 511. Rule 509 is not, or at least should not be interpreted to allow the ISB one opportunity to prosecute informally, then to pursue a second action formally. Each Rule has its own appeal to the hearing committee process and appeal to the Idaho Supreme Court process.

In this case, the initial time of "jeopardy" occurred when ISB counsel, Dan Grober reviewed the facts and rendered the decision. The evidence that this was a time of "jeopardy" is as follows:

1. If the attorney did not respond to the original complaint, the attorney was informed that sanctions could be imposed.
2. If the decision was not agreed to by either party, that party could "appeal" to a higher source.
3. A specific time period for appeal is listed.

In other words, the ISB counsel was "putting on their hat as a judge" and rendering a decision that could bring about specific consequences to defendant.

The second time of "jeopardy" occurred when the hearing committee reviewed the facts and rendered decisions in writing. The hearing committee according to Rule 509(c)(6) has twenty-one days from the date that the matter is assigned to it (in this case May 1, 1997) to render a decision. The only decisions lodged within said 21 day time period that would end on May 22, 1997 were the written decisions of the parties. On May 13, 1997, Mr. Kane wrote " I have reviewed the complete file sent by your office in Appeal Case No. 96-033A-Jenkins and hereby notify your that I concur with Bar Counsel's decision to dismiss the matter." On May 19, 1997 Mr.

Mossman wrote "Based upon my review of theis matter, it is my individual decision to approve the Bar Counsel's Disposition of this case." On May 16, 1997 a letter was received by the ISB form Mr. Lucas asking some questions (Letter is attached in Exhibit C), but not giving a final decision. Claudia Kopper, the Clerk for the Professional Conduct Board, had received all of said letters by June 10, 1997.

According to Rule 509(c)(5) the hearing committee only has the four alternative choices listed below:

(A) approve Bar Counsel's disposition; or
(B) reject Bar Counsel's disposition; or
(C) modify Bar Counsel's disposition; or
(D) recommend the filing of formal charges.

The decisions had been rendered with a majority deciding to "approve the Bar Counsel's disposition" or in other words, dismiss the complaint against the defendant. At this point jeopardy had again attached and the only alternative left for either party to the action was if a timely appeal had been taken to the Idaho Supreme Court.

In order to take an appeal to the Idaho Supreme Court Rule 509(c)(9) says that "A written petition for such review, stating the reasons for the request, shall be filed with the Clerk of the Supreme Court, within twenty-one (21) days of service of the decision. No appeal to the Idaho Supreme Court was filed by either party to this action.

Instead, on June 3, 1998 a formal complaint pertaining to the same matters and issues as originally filed in the Nicholasa Perez matter was filed Before the Professional Conduct Board of the ISB.

The complaint filed June 3, 1998 constitutes double, if not triple jeopardy and has been filed in violation of the due process rights of

the defendant and should be dismissed.

Therefore, the defendant hereby respectfully requests that the Professional Conduct Board dismiss said complaint with prejudice.

DATED This 12th day of October, 1998.

JENKINS LAW OFFICE

s/Gordon W. Jenkins
Gordon W. Jenkins

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 12th day of October, 1998, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

Ms. Jo-Ann L. Bowen, Esq.
IDAHO STATE BAR ASSOCIATION
P.O. Box 895
Boise, ID 83701

[X] Mailing
[ ] Hand Delivery
[X] Facsimile

s/Gordon W. Jenkins
Gordon W. Jenkins

Appendix L — Requested Supplemental Memorandum in Support of Defendant's Motion to Dismiss dated April 22, 1999

Gordon W. Jenkins
JENKINS LAW OFFICE
2595 Channing Way
Idaho Falls, ID 83404
Telephone: (208) 524-2650
Facsimile: (208) 524-2760

BEFORE THE PROFESSIONAL CONDUCT BOARD OF THE IDAHO STATE BAR ASSOCIATION

Requested Supplemental Memorandum in Support of Defendant's Motion to Dismiss, ISB File No.: 98-003

Idaho State Bar,

Plaintiff

v.

Gordon W. Jenkins,

Defendant

TO: THE CLERK OR SECRETARY OF THE PROFESSIONAL CONDUCT BOARD FOR THE IDAHO STATE BAR ASSOCIATION.

COMES NOW the Defendant, Gordon W. Jenkins and provides his REQUESTED SUPPLEMENTAL TO MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS that was filed on March 29, 1999. Based upon these documents the Defendant moves that the Professional Conduct Board to dismiss the attached complaint filed before Professional Conduct Board of the State of Idaho on the 3rd day of June, 1998.

Appendix L

Statement of Facts

The original Memorandum contains the facts as the related to said original Memorandum. But during the actual hearing related to Defendant's Motion to dismiss, there were certain questions that came up to which Defendant wanted to respond. That is the purpose of this Supplemental Memorandum.

Argument

Various requests were made during the hearing and other issues came up that I have agreed to address in a supplemental memorandum. I will address the various issues discussed in the hearing one at a time in the following paragraphs.

1. Is a disciplinary action administrative (i.e. the equivalent of "civil") or Judicial?
2. Double jeopardy: One of the Hearing Committee members asked if we could produce a case directly on point regarding the double jeopardy issue?
3. Does "Res Judicata" or "Collateral Estoppel" apply in this circumstance.
4. What is the effect of failing to file a timely appeal?
5. When did the Defendant first receive the letters of the Hearing Committee showing that two members voted to dismiss the case?
6. Can the Hearing Committee send the matter back for additional investigation?
7. Is there prejudice to the Defendant by the delay in filing the formal complaint?

The following information is being provided associated with the above issues:

1. Is a disciplinary action administrative (i.e. the equivalent of "civil") or Judicial?

The Idaho Supreme Court in the case of Idaho State Bar v. Jenkins, 120 Idaho 379, 816 P.2d 335, (1991) states that "Attorney disciplinary matters are judicial and not administrative . . ."

2. Double jeopardy: One of the Hearing Committee members asked if we could produce a case directly on point regarding the double jeopardy issue?

Double jeopardy has traditionally been ruled not to apply to cases of attorney discipline when the defendant who was an attorney had been convicted of a crime and then wanted to argue that the filing of disciplinary charges would constitute "double jeopardy." The various Courts' response to such an argument is that such a situation does not constitute double jeopardy because the purposes and elements of the criminal charges and the purposes and elements of disciplinary charges are different therefore, no double jeopardy has occurred. **The circumstance for which said conclusion was reached by the courts is different than in this case. In this case the defendant was charged in the first action with a disciplinary violation with the same facts, elements and specific purpose-disciplinary action against the attorney. Said action was dismissed. The decision became final when the appeal time ran with no appeal. The defendant was then charged a second time with what was referred to as an appeal to a hearing committee, which initially also agreed on a two to one decision that the disciplinary charge should be dismissed. (This constituted the second jeopardy because the second charge was based upon the same facts, elements and was for the same purpose-disciplinary action against an attorney). The filing of the third or formal complaint (the third jeopardy) was for the same facts, element and specific purpose as the first two decisions. All three matters were identical and therefore, analysis of the case law would require that double jeopardy would be applied in this circumstance where it would not do so in the previous circumstance when the attorney convicted for a crime attempted to argue double jeopardy in the subsequent disciplinary action. Case**

law that supports this proposition is as follows:

Dept. Of Revenue of Montana v. Kurt Ranch, 511 U.S. 767, 114 S.Cr. 1937, 128 L.Ed.2d 767 (1994):

> In Halper, we considered "whether and under the circumstances a civil penalty may constitute 'punishment' for the purpose of double jeopardy analysis"
>
> On direct appeal to this Court, we rejected the Government's submission that the Double Jeopardy Clause only applied to punishment imposed in criminal proceedings, reasoning that its violation "can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state. In making such an assessment, "the labels 'criminal' and 'civil' are not of paramount importance."
>
> "To be put in jeopardy" does not remotely mean "to be punished," so by its terms this provision prohibits, not multiple punishments, but only multiple prosecutions."
>
> "Between Lange, 18 Wall 163 (1874) and our decision five Terms ago in United States v. Halper, 490 U.S. 435 (1989), our cases often state that the Double Jeopardy Clause protect against both successive prosecutions and successive punishments for the same criminal offence.
>
> "To tell the truth, however, until Halper was decided, extending the "no double punishments" rule to civil penalties, it did not much matter whether that rule was a free-standing constitutional prohibition implicit in the Double Jeopardy Clause or (as I think to be the case) merely an aspect of the Due Process Clause of legislative authorization. Even if it were thought to be the former, the Double

Jeopardy Clause's ban on successive criminal prosecutions would make surplusage of any distinct protection against additional punishment imposed in a successive prosecution, since the prosecution itself would be barred."

"It is time to put the Halper genie back in the bottle, and to acknowledge what the text of the Constitution makes perfectly clear: The Double Jeopardy Clause prohibits successive prosecution, not successive punishment."

"The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense."

United States v. Harper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989)

"This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. . .the labels 'criminal' and 'civil' are not of paramount importance."

Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982)

"From the very beginning, a disciplinary proceeding is judicial in nature, initiated by filing a complaint with an ethics and grievance committee."

"Justice Brennan concurring stated: The traditional and a primary responsibility of state court for establishing and enforcing standards for members of their bars and the quasi-criminal nature of bar disciplinary proceedings,

> In re Ruffalo, 390 U.S. 544, 551 (1968) call for exceptional deference by the federal courts."

(The point of previous quotation is the fact that disciplinary proceedings are "quasi-criminal" in nature).

Brown v. State Department of Health, Dental Disciplinary Board, 972 P.2d 101, (Wash.App.Div.3 1998)
"The double jeopardy clause of the Fifth Amendment to the United States Constitution protects against multiple punishments for the same offense." Department of Health, 89 Wash.App. 751, 756, 951 P.2d 266 (1997) (citing State v. McClendon, 131 Wash2d 853, 862, 935 P.2d 1334, cert. Denied, --U.S.__, 118 S.Ct. 624, 139 L.Ed.2d 605 (1997). The double jeopardy clause is applicable to the state through the Fourteenth Amendment.". . .Double jeopardy applies only when the two proceeding involve the same offense under the "same elements" test. Ludeman, 89 Wash.App. at 756, 951 P.2d 266. The test, as recently stated by the United States Supreme Court, is 'whether each offense contains an element not contained in the other; if not, they are the "same offense" and double jeopardy bars additional punishment and successive prosecution.'" Id. (citing United States v. Dixon 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).

People v. Marmon, 903 P.2d 651 (Colo 1995):

> "A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving retributive or deterrent purposes, is punishment for double jeopardy purposes."

(Even though the primary purpose may be for remedial purposes or to protect the public, there can be no question that there also is a retributive and deterrent purpose.)

Office of Disciplinary Counsel v. Campbell, Pa. 345 A.2d, 616,

(Supr.Crt. 1975)

> "The double jeopardy clause prevents subsequent trials for the same act by the same sovereign whether the initial trial result in acquittal or conviction."

People v. D'Angello, 401 Mich. 167 257 N.W.2d 655, (1977):

> "Although disciplinary proceedings against attorneys are neither civil or criminal (State v. Holmes, 218 Kan. 531, 545 P.2d 343 [1976]) such proceedings have frequently been characterized as quasi-criminal in nature for purposes of considering the application of procedural safeguards. (Citations omitted for In re Ruffalo). The sanction threatened under such proceedings , loss of professional status and livelihood, have been equated to criminal penalties for the purposes of deciding whether the clause against self-incrimination of the Fifth Amendment applied in such proceedings. Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574

3. <u>Does "Res Judicata" or "Collateral Estoppel" apply in this circumstance?</u>

The first question has to be whether the decision entered by Dan Grober on October 29, 1996 is a final judgment. Dan Grober's response to Nicholasa Perez included not only the letter of October 29, 1996, but all of the documentation that existed associated with the defendant's response. Therefore, every question of Nicholasa was addressed and answered by explanation and supporting documentation. When a judgment is final is addressed in the case Equal Water Rights Ass'n v. City of Coeur D'Alene, 110 Idaho 247, 715 P.2d 917 (1985) as follows:

> "Where the Court's order included a comprehensive adjudication of the subject matter in controversy and represented a final determination of the rights of the parties, it was

intended to be the final decision."

Obviously, the letter of October 26, 1996 was intended to be a final judgment. This is also evidenced by the fact that an appeal time was referred to in Mr. Grober's letter.

In the Case of In re Donald Martin WITTE, an attorney, Respondent, 99 Ill.2d 301, 76 Ill.Dec. 84 (1984) it was determined that "Findings in Missourri disciplinary proceedings were res judicata in reciprocal disciplinary action."

Kabatnik v. Westminster Co., 306 S.E.2d 513 (N.C.App. 1983) states as follows:

> "A final judgment, rendered on the merits by a court of competent jurisdiction, is conclusive as to the issues raised therein with respect to the parties and those in privity with them and constitutes a bare to all subsequent actions involving the same issues and parties. Masters v. Dunstan, 256 N.C. 520, 124 S.E.2d 574 (1962); Gaithers Corp. v. Skinner, 241, N.C. 532, 85 S.E.2d 909 (1955). In order for res judicata to apply, there must have been a prior adjudication on the merits of an action involving the same parties and issues as the action in which the defense of res judicata is asserted. King v. Grindstaff, 284 N.C. 348, 200 S.E.2d 799 (1973); Teague v. Anlexander, 38 N.C.App. 332, 247 S.E.2d 775 (1978), disc. rev. denied 296 N.C. 414, 251 S.E.2d 473 (1979). Strict identity of issues, however, is not absolutely required and the doctrine of res judicata has been accordingly expanded to apply to those issues which could have been raised in the prior action, but were not. Gaithers Corp. v. Skinner, supra. Res judicata will apply regardless of any differences in the manner in which the claims are asserted.
>
> [U]nder application of the rule precluding subse-

> quent litigation of the same cause of action, a party defendant who interposes only a part of a claim by way of recoupment, setoff, or counterclaim is ordinarily barred from recovering the balance in a subsequent action.
>
> Id. 241 N.C. at 536, 85 S.E.2d at 911. For purposes of res judicata, a voluntary dismissal with prejudice is an adjudication on the merits in favor or the opposing party. Barnes v. McGee, 21 N.C.App. 287, 204 S.E.2d 203 (1974)

As a result, it was clear that a final decision was entered that was subject to appeal. The appeal did not occur timely, therefore, the judgment became final and became res judicata regarding any future filings associated with this matter.

Collateral Estoppel also bars the re-litigation of the issues in this case. The Case of Magic Valley Radiology, P.A. v. Kolouch, 123 Idaho 434, 849 P.2d 107, (Idaho 1993) states:

> "The Doctrine of collateral estoppel prevents re-litigation of issues actually litigated and decided in prior case."

> The case goes on to state:
> "We think the correct rule to be that in an action between the same parties upon the same claim or demand the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should

have been litigated in the first suit."
123 Idaho at 436-437, 849 P.2d at 109-110, quoting Joyce v. Murphy Land & Irrigation co., 35 Idaho 549, 553, 208 P. 241, 242-243 (1922). See also, Kawai Farms, Inc. V. Longstreet, 121 Idaho 610, 614, 826 P.2d 1322, 1326 (1992); Diamond v. Farmers

Insurance Co., 119 Idaho 146, 148, 804 P.2d 319, 321 (1990).

4. What is the effect of failing to file a timely appeal?

In this case on January 29, 1996 attorney, David McGuire presented the complaints of Nicholasa Perez to the ISB-See attached Exhibit A. Subsequently, the facts as presented were responded to by the Defendant and on October 29, 1996, Dan Grober rendered his "judicial decision" dismissing the case and allowing fourteen days for there to be an appeal before the matter became a final decision-See attached Exhibit B. No Appeal was tendered within the fourteen days. Her attorney, David McGuire also filed no timely appeal on her behalf. Idaho Courts have been clear that filing an appeal within the time limits is jurisdictional. In the case of State v. James, 112 Idaho 239, 731 P.2d 234 (Ct.App. 1986) the Idaho

> Court of Appeals stated:
> "The requirement of perfecting an appeal with the 42-day (in this case the time required by the Idaho Rules of Professional Conduct was 14 days) time period is jurisdictional; **appeals taken after expiration of the filing period must be dismissed.**" (Emphasis added).

This same statement of law is made in the following cases including the case of State v. Rollins, 103 Idaho 48, 644 P.2d 370

> (Ct.App. 1982):
> Because the question of jurisdiction on appeal from a conviction is fundamental, it must not be ignored when brought to the attention of the Court of Appeals, and should be addressed before considering the merits of the substantive appeal.
>
> Appellate jurisdiction would vest only if a notice of appeal was filed within 42 days (in this case 14 days) of the entry of a particular order sought to be challenged. Ziemann v. Creed, 121 Idaho 259,, 824 P.2d 190 (Ct.App. 1992).

> The requirement of perfecting an appeal within the time period allowed by I.A.R. Rules 11 and 14, is jurisdictional. An appeal taken after expiration of the filing period will be dismissed. State v. Tucker, 103 Idaho 885, 655 P.2d 92 (Ct.App. 1982)
>
> Appeal filed 43 days (in this case the number of days would be 15 or one day after the allowed 14 days) after entry of judgment of conviction was untimely under this rule where no intervening motion was made in the case, and the failure to file timely notice was a jurisdictional defect requiring dismissal of the appeal under I.A.R. 21.

State v. Fuller, 104 Idaho 891, 665 P.2d 190 (Ct.App. 1983)
There is no option or choice as to whether a late filed appeal must be dismissed. A timely appeal is jurisdictional. Without a timely appeal the appellate body has absolutely no jurisdiction to act in any manner other than to state that they must dismiss the case due to the untimeliness of the appeal.

5. When did the Defendant first receive the letters of the Hearing Committee showing that two members voted to dismiss the case?

I do not find a letter that tells me the exact date of the receipt of the letters regarding the decisions of the hearing committee members. However, recognizing that this all took place over three years ago, it is my impression that after the committee made their decision, I was contacted and informed regarding the decision. But, again, I have no specific recollection when the actual letters were received.

6. Can the Hearing Committee send the matter back for additional investigation?

Rule 503 describes the powers and duties of the hearing commit-

tees. However, there is a distinction between the powers and duties of an "original jurisdiction" such as when the case originates under Rule 511 and the powers and duties of a Hearing Committee acting in an "appellate capacity" as listed under Rule 509. The hearing committee is "judicial" in nature. It is not and should not be an advocate for either side. For the hearing committee to become adversarial in nature during the appellate procedure of Rule 509 results in an improper aberration of due process. As an appellate body, they are to remain neutral in an objective review of the prior proceedings until a decision is made as referred to in Rule 509(c)(5).

7. Is there prejudice to the Defendant by the delay in filing the formal complaint?

The answer is yes. The defendant is substantially prejudiced as I will explain in the following paragraphs.

From late 1995 to the present the defendant has spent a large amount of time representing over 200 plaintiffs who were severely poisoned from very toxic chemicals (PCBs) that were in violation of the law and knowingly dumped into waterways and streams that these people as children swam in and drank. These plaintiffs are mostly located in Lobelville, Tennessee. This case required the defendant to travel to Tennessee for sometimes weeks at a time. As a result of this during the years of late 1995, 1996 and early 1997, the management of the law firm was turned over to other attorneys while I traveled largely to Tennessee and did other work associated with this case. Particularly during the years of 1996 and early 1997, a professional trust was formed that controlled and managed by another attorney. He maintained the financial records-including all of the payroll records during those years.

As I mentioned, there was an employee who was a young blonde married woman who was bilingual who actively participated in almost every contact that I had with Nicholasa Perez. This ladies

testimony is very important. She has the knowledge to counter many if not all of the allegations made by Nicholasa Perez in her complaint. She worked in the office as an interpreter because I do not speak Spanish of any significant amount. Therefore, our office has always maintained bilingual persons on the staff. At that time she was our primary interpreter. She left the law firms employ some time during 1996. She first went to manage some apartments, then supposedly left the area.

The prejudice is this. During those years, the accounting, record keeping, and payroll records were all kept by the secretary to the attorney who was managing the firm at that time. There came a time when that attorney and I did not see eye to eye regarding the law firm. He was invited to leave and as part of such, took with him the two other attorneys in the firm, his secretaries, and the records. He took the records because he was responsible to see that the payroll taxes got paid. He got behind on them and since he was the one who was liable for them, he took all the payroll records.

The net effect is that I can not even locate records that would tell me her name-if I remember right her first name was Melissa. Had I realized that the long delay before filing the complaint would have resulted in a complaint being filed, I would have certainly maintained a closer contact to this young woman. Unfortunately, at this point, the attorney who left Jenkins Law Office and I do not have a good relationship. Those records would not be available to me. This together with the long length of time that has elapsed as if effects one's ability to remember makes the prejudice extremely significant.

Therefore, the defendant hereby respectfully requests that the Professional Conduct Board dismiss the current complaint as filed before the Professional Conduct Board.

DATED this 22nd day of April 1999.

Appendix L

JENKINS LAW OFFICE
s/Gordon W. Jenkins

Gordon W. Jenkins

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 22nd day of April 1999, I caused a true and correct copy of the foregoing REQUESTED SUPPLEMENTAL TO MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

Served via fax: (208) 334-4515
Ms. Jo-Ann L. Bowen, Esq.

Served via fax: (208) 336-5193
Phillip S. Obberrect

Served via fax: (208) 334-4515
Ms. Claudia Kopper
Secretary of Professional Conduct Board

Served via fax: (208) 939-1451
Lynn Melton

Served via fax: (208) 345-7212
Robert D. Lewis

s/Gordon W. Jenkins

Gordon W. Jenkins

Appendix M — Defendant's Objection to Plaintiff's Motion Motion to Dismiss, dated August 31, 1999

IN THE SUPREME COURT OF THE STATE OF IDAHO

DOCKET NO. 25727

IDAHO STATE BAR, Plaintiff/Respondent,

v.

IDAHO STATE BAR, Defendant/Appellant.

DEFENDANT'S OBJECTION TO PLAINTIFF'S MOTION MOTION TO DISMISS

COMES NOW the Defendant/Appellant, Gordon W. Jenkins, and pursuant to I.A.R. Rule 32, respectfully submits this objection to Plaintiff's Motion to Dismiss the Appeal in this matter.

BACKGROUND INFORMATION

On June 3, 1998 the State Bar filed a formal complaint against Defendant under Idaho Bar Commission Rule 511. Prior to this complaint being filed the Defendant did not receive a notice that a decision had been made to file formal charges based upon the previous matters 'that were being handled on an informal basis. As a result, on October 12, 1998, Defendant filed an Objection, or a Motion to Dismiss this formal complaint. After October 12, 1998 the Defendant was ordered to answer the formal complaint before the Committee would consider the Motion to Dismiss. On November 3, 1998 the Defendant appealed said ruling of the hearing committee. The appeal was dismissed as not being an appealable order thereafter. On June 7, 1999, the Hearing Committee, in its Memorandum Decision and Order, denied Defendant's Motion to Dismiss. It is the filing of formal charges under Rule 511 and the Memorandum Decision and Order of the Hearing Committee that

Defendant now Appeals. Both of these appeals were intended to constitute the Defendant's right to appeal under Rule 509(c)(9).

The matters in the complaint before The Professional Conduct Board pertain to complaints lodged with the Idaho State Bar by Nicholasa Perez. Ms. Perez during all of these proceedings was represented by David MaGuire, an attorney in Pocatello, Idaho.

The formal complaint filed with the Idaho Professional Conduct Board is based on the same charges that were previously filed and dismissed on two prior occasions in proceedings before the ISB. The ISB, in filing the previous complaint, was acting under the authority of The Professional Conduct Board of the State of Idaho and the Idaho Supreme Court. Defendant argued that the subsequent filing of another formal complaint before The Professional Conduct Board is an act in violation of Defendant's Constitutional rights of due process and right against double jeopardy.

The original complaint was filed pursuant to Idaho Bar Commission Rule, 509(a) and (b). The letter of complaint was listed as being a Grievance by Nicholasa Perez, ISB File No. 96-033. This constituted an informal complaint that had penalties which could be assessed, the right to appeal to a hearing committee, and a second right to appeal to the Idaho Supreme Court. This complaint constituted a "quasi-criminal" action with consequences attached to it in the event the defendant did not respond. In fact, the letter of complaint was directly from the ISB acting in its capacity as judge or reviewing officer. It made no reference to the claim still being in the investigative status. It made no reference to the fact that if Defendant did not respond, a complaint would be filed. Instead, it clearly stated that, in the event no response was received, "your failure to respond to this grievance may result in the imposition of sanctions pursuant to Idaho Bar Commission Rule 505(e)."

Rule 509(a) specifically states the options available after an investigation is completed. One option is to file "formal charges" under

Rule 511. Six other options are enumerated, ranging from dismissal of the claim to the imposition of sanctions. Rule 509 does not give the ISB the right to ignore the Constitutional rights of the party being charged.

Rule 509 gives the option of continued proceedings under the more informal 509 or of formal proceedings under Rule 511. Whether the ISB chooses proceedings under Rule, 509 or Rule 511, both rules have their own review and appeal procedures that allow review by a "hearing committee" and then review by the Idaho Supreme Court if necessary.

In this case, after the initial investigation was completed, the ISB elected to continue its proceedings under Rule 509. The complaint was then assigned the ISB No. 96-033 and sent to Defendant, who responded to this complaint.

On October 29, 1996, a decision was issued dismissing the grievance filed against Defendant. The Notice of Dismissal was sent to the complaining party, Nicholasa Perez and her attorney, David MaGuire. The Notice of Dismissal specifically indicated that the charges against the Defendant had been dismissed and designated a specific time period in which an appeal of the dismissal could be filed. No timely appeal was ever made.

Rule 509(a) indicates that the time to appeal is fourteen days. Since no timely appeal was filed, the dismissal became final fourteen days later on November, 12, 1996. On February 24, 1997, long after the dismissal became final, Ms. Perez found another sympathetic ear in the way of a friend who wrote the ISB again complaining of the matters stated in the original complaint which had been dismissed. Ms. Perez indicated that the reason for the late response was that she could not find an interpreter. This statement is false in that Ms. Perez not only had an attorney representing her, but also has two teenage daughters who lived with her and speak excellent English.

Upon receipt of this second letter from Ms. Perez, the ISB presented the same charge a second time. This time it was described as a Notice of Assignment of Committee, or an appeal of the prior charge as is described in the Notice dated May 1, 1997 from the ISB to Defendant. This Notice indicated that the charges "pursuant to Rule 509(c)(3) of the Rules for Review of Professional Conduct, along with the approval of the Idaho Supreme Court, this matter is hereby assigned to a Hearing Committee consisting of Michael Kane (Chair), Hugh Mossman, and Larry Lucas."

These charges were presented to the hearing committee. Although this stage represented a "double jeopardy" of the prior charges, the hearing committee reviewed the charges and made a decision. Rule 509(c)(5) states that "the hearing committee, following its review may: (A) approve Bar Counsel's disposition; or (B) reject Bar Counsel's disposition; or (C) modify Bar Counsel's disposition; or (D) recommend the filing of formal charges." Rule 509(c)(6) states that the "hearing committee shall render its decision within twenty-one (21) days following the date upon which the matter is assigned to it for review".

These rules specify what actions can be taken by the committee and in what time frame it must be done. The decision rendered by the committee, after twenty-one days, was in favor of Defendant. Two of the three committee members voted to dismiss the matter-. The decision was tendered to the ISB in May, 1997. Based upon the decision rendered by the committee, Rule 509(c)(6) gives the ISB twenty-one days to file and appeal to the Idaho Supreme Court. Rule 509(c)(9) states: "The grievant and/or the defendant may seek Supreme Court review of a hearing committee decision made pursuant to subsection (5) above." The Rule gives the parties twenty-one days to appeal. No appeal to-the Supreme Court was filed. Therefore, the decision of the committee would have become final no later than July 1, 1997.

However, almost a year later, on June 3, 1998, Jo-Ann L. Bowen,

Assistant Bar Counsel, filed a formal complaint related to the exact same issues which were previously dismissed in both of the prior proceedings discussed above.

ARGUMENT

Idaho Bar Commission Rule 509 specifically allows for review by the Idaho Supreme Court. Rule 509(c)(9) allows for Supreme Court review of Hearing Committee decisions. The Rule, in pertinent part, states:

> Supreme Court Review. The grievant and/or the defendant may seek Supreme Court review of a hearing committee decision made pursuant to subsection-(5) above. A written petition for such review, stating the reasons for the request, shall be filed with the Clerk of the Supreme Court,, within twenty-one (21) days of service of the decision. The petition shall contain a simple statement, of the reasons the petitioner believes that the hearing committee decision is clearly erroneous or arbitrary and capricious. . . .

This is exactly what Defendant is doing. Defendant, in its October 12, 1998 Motion to Dismiss, is objecting to the filing of formal charges under Rule 511, which was the decision of the hearing committee. When the hearing
committee denied Defendant's Motion to Dismiss, Defendant filed this Appeal to the Supreme Court pursuant to Commission Rule 509(c)(9) which specifically authorizes such an appeal directly to the Supreme Court. Defendant's Motion to Dismiss enumerated the reasons Defendant objected to the hearing committee's decision to file formal charges under Rule 511. Defendant has now filed an appeal of this Hearing Committee decision that is clearly erroneous.

Plaintiff argues that denials of summary judgment are not appeal

able. However, it is not the denial of a summary judgment which Defendant appeals since Defendant's Motion to Dismiss was really his objection to the hearing
committee decision to file formal charges. So it is the hearing committee's denial of Defendant's objection to the filing of formal charges that the Defendant is appealing.

Even if this were not the case, the Court has considered appeals of summary judgment denials. In North Pacific Ins. Co. v. MAI, 130 Idaho 251, 939 P.2d 570 (1997), the Court allowed an Appeal of a denial of a Summary Judgment Motion. The Court stated:

> A denial of summary judgment by a district judge is not appealable unless the district judge was acting as an appellate court or unless we grant permission to appeal. I.A.R. 11(a) (1) and 12; Bluestone v. Mathewson, 103 Idaho 453, 454, 649 P.2d 1209, 1210 (1982). North Pacific did not seek permission to appeal, Mai did not question the appealability of the trial court's, denial of summary judgment, and we did not identify the question concerning appealability until after oral argument. Under these circumstances, and because the trial court's decision involves a controlling question of law as to which there is substantial grounds for difference of opinion and because an immediate appeal may materially advance the orderly resolution of the litigation, we will consider' and treat this appeal as an appeal by permission under I.A.R. 12. Kindred v. Amalgamated Sugar Co., 118 Idaho 147, 149, 795 P.2d 309, 311 (1990).

Id. at 252, 253.

Likewise in Kindred v. Amalgamated Sugar Co., (supra) the Court granted an appeal by permission even though the appellant had not sought permission. The court stated:

> Generally, an appeal under I.A.R. 12 will be permitted when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal may materially advance, the orderly resolution of the litigation. . . . Since this case has been briefed and argued we will consider and treat this appeal as an appeal by permission under I.A.R. 12.

Id. at 149.

However, the appeal of this matter is not an appeal of a summary Judgment denial. It is Defendant's appeal of the hearing committee decision to pursue formal-charges under Rule 511. It is the appeal of such a ruling as authorized by Rule 509(c)(9), that Defendant's Motion to Dismiss was addressing. So when this Motion was denied, Defendant appealed pursuant to the appeal right stated in Rule 509. The appeal of this matter addresses the Constitutional rights of Defendant. For the following reasons, the resolution of this appeal would put a timely end to this litigation.

Attorney discipline matters are judicial in nature, not administrative. Idaho State Bar v. Jenkins, 120 Idaho 379, 816 P.2d 335 (1991).

Defendant has been subjected to 'double jeopardy". The attorney discipline proceedings are quasi-criminal in nature. In this case, Defendant was charged in the first action with a disciplinary violation. This action was dismissed and the decision became final when the appeal time ran. The Defendant was then charged a second time, with what was referred to as an appeal to the hearing committee, which also agreed in a majority decision to dismiss the charges. This second charge was based upon the facts and elements as the first. The purpose of this same, second charge, i.e. attorney discipline, was also the same. The filing of the third or formal complaint was also based upon the same facts and elements, and for the

same purpose, as the first two complaints. All three matters are identical. Therefore, double jeopardy would be applicable in this circumstance, as opposed to the circumstance where an attorney is first convicted criminally and then argues double jeopardy in the attorney discipline action.

The issues between Defendant and the State Bar in these proceedings were the same. The issues were resolved twice in favor of Defendant. The State Bar should be precluded from trying these same issues again. The principles of "Res Judicata" or "Collateral Estoppel" should bar Plaintiff from having a third try, all at Defendant's expense. After a specified period of time (the appeal time specified in the Rules) Defendant should not have to suffer continued and repeated prosecution for the same conduct.

CONCLUSION

Therefore, Defendant respectfully requests that Plaintiff's Motion to Dismiss this Appeal be denied. This appeal raises grave concerns regarding Defendant's Constitutional rights and is made pursuant to Rule 509(c)(9) because the hearing committee decided to pursue formal charges despite the foregoing Constitutional issues.

RESPECTFULLY SUBMITTED THIS 31st day of August, 1999.

JINKINS LAW OFFICE

s/Gordon W. Jenkins
Gordon W. Jenkins

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 1999, a true and correct copy of the above and foregoing DEFENDANT'S OBJECTION TO PLAINTIFF'S MOTION TO DISMISS was delivered to the attorney named below by-the method indicated:

Jo-Ann L. Brown, Esq.
Assistant Bar Counsel
Idaho State Bar
P.O. Box 895
Boise, ID 83701

[X] U. S. - mail
[ ] Hand Delivery
[X] Facsimile
[ ] Express Mail

s/Gordon W. Jenkins
Gordon W. Jenkins

Appendix N — Section V
Rules for Review of Professional Conduct

SECTION V

Rules For Review Of Professional Conduct

RULE 500. Jurisdiction - Effective Date - Statute of Limitations

(a) **Power of Supreme Court.** The Supreme Court of the State of Idaho has the inherent power and the exclusive responsibility within the State of Idaho for the maintenance of appropriate standards of professional conduct and for the structure and administration of the system for the review of the professional conduct of each lawyer admitted to or practicing law in the State of Idaho.

(b) **Powers of Lower Courts.** These rules shall not be construed to deny to any court the powers necessary to maintain control over its proceedings.

*(c) **Effective Date.** These Rules shall become effective on November 1, 1986. Any proceeding then pending with respect to which a formal hearing has been commenced shall be concluded under the procedure existing prior to the effective date of these Rules. Amendments to Rules 502 through 518 by Order dated May 29, 1991 shall become effective immediately upon adoption by the Supreme Court; provided those amendments to Rules 502 through 511 shall not apply to pending disciplinary matters which have been heard and decided by a hearing committee and are pending before the Professional Conduct Board; and provided further, the amended procedure for appointment of a hearing committee shall not apply to hewing committees appointed by the Professional Conduct Board prior to the effective date of these amendments, but all other amendments shall apply to such pending cases.
**(Section(c) amended 5-29-91)*

(d) **Statue of Limitations.** Proceedings under these Rules

shall be exempt from all statutes of limitations.

RULE 501. Definitions. As used in the Rules relative to professional conduct, the following terms have the following meanings, unless expressly otherwise provided, or as may result from necessary implications.

(a) **Board of Commissioners.** "Board of Commissioners": means the duly elected governing body of the Idaho State Bar.

(b) **Certificate of Conviction.** "Certificate of Conviction" means a certificate under the seal of a court by any Judge or Clerk thereof certifying the court record or any part thereof concerning the trial and conviction of any attorney in a proceeding before said Court.

(c) **Clerk.** "Clerk" means the Clerk of the Professional Conduct Board of the Idaho State Bar.

(d) **Conviction.** "Conviction" means a plea of nolo contendre, a plea of guilty, a jury verdict of guilty or a court decision of guilt whether or not a formal judgment of conviction has been entered and whether or not sentence has been imposed, withheld or suspended.

(e) **Counsel or Bar Counsel.** "Counsel" or "Bar Counsel" means the disciplinary counsel of the Idaho State Bar.

(f) **Court or Supreme Court.** "Court" or "Supreme Court" means the Supreme Court of the State of Idaho.

(g) **Defendant.** "Defendant" means a lawyer whose professional conduct is under review.

(h) **District Court.** "District Court" means a court of general jurisdiction in the State of Idaho.

(i) **Grievant.** "Grievant" means the individual who, or entity which, files in the office of Bar Counsel a written statement alleging that a lawyer has engaged in misconduct.

(j) **Lawyer.** "Lawyer" means a person who has met the qualifications for and been duly admitted to the practice of law in the State of Idaho.

(k) **Petitioner.** "Petitioner" means:

(1) a suspended or disbarred lawyer who is seeking reinstatement to the practice of law in the State of Idaho; or

(2) a lawyer who is seeking to return to active status from disability inactive status.

(l) **Plaintiff.** "Plaintiff' means the Idaho State Bar which, in all cases, shall be the party in whose name proceedings under these Rules shall be prosecuted.

(m) **Professional Conduct.** "Professional Conduct" means conduct which occurs within or without the attorney-client relationship which constitutes misconduct or conduct reflecting on the lawyer's fitness to practice law.

(n) **Professional Conduct Board or Board.** "Professional Conduct Board" or "Board" means the Professional Conduct Board of the Idaho State Bar.

(o) **Record.** "Record" means the formal parts of the record of proceedings involving the review of allegations of a lawyer's professional conduct, including the letter of grievance; the defendant's response to the grievance; all notices of hearings; all pleadings or motions; all exhibits marked and offered in evidence; the transcript of testimony, the findings and recommendations of the Boards and committees; all orders imposing sanctions; whether private or pub-

lic in nature and which is considered in determining the sanction to be imposed in a matter seeking imposition of a public sanction.

(p) **Respondent.** "Respondent" means a lawyer whose competency or disability status is under review.

(q) **Rules or These Rules.** "Rules" or "These Rules" means Rules 500 through 525 of the Rules for Review of Professional Conduct.

(r) **Sanction.** "Sanction" means the imposition of restrictions upon a lawyer's right to practice law and/or the censure of a lawyer's professional conduct by any duly authorized professional conduct enforcement authority.

*(s) **Serious Crime.** "Serious Crime" includes all felonies and any lesser crimes, a necessary element of which, as determined by the statutory or common law definition of such crime, involves:

(1) improper conduct as a lawyer;
(2) interference with the administration of justice;
(3) false swearing;
(4) misrepresentation;
(5) fraud;
(6) willful failure to file income tax returns,
(7) deceit;
(8) bribery;
(9) extortion;
(10) misappropriation;
(11) theft; or
(12) an attempt, a conspiracy, or the solicitation of another to commit a serious crime.

**(Section (s) amended 2-13-92 -Effective 7-1-92)*

(t) **State.** "State" means the State of Idaho.

Appendix N

***RULE 502. Professional Conduct Board**

(a) **Establishment and Membership of Board.** The Board of Commissioners shall appoint, with the approval of the Supreme Court, a twenty-one (21) member board to be known as "The Professional Conduct Board of the Idaho State Bar" which shall consist of members of the Idaho State Bar in good standing and non-lawyer members.

(1) Terms of Office. Members of the Board shall serve for terms of three (3) years provided that appointments shall allow for staggered expiration of terms.

(A) Five (5) members of the Idaho State Bar and three (3) adult Idaho citizens who are persons of good moral character and reputation who are not lawyers, appointed for an initial term ending July 30, 1992;

(B) Five (5) members of the Idaho State Bar and two (2) adult Idaho citizens who are persons of good moral character and reputation who are not lawyers, appointed for an initial term ending July 30, 1993;

(C) Four (4) members of the Idaho State Bar and two (2) adult Idaho citizens who are persons of good moral character and reputation who are not lawyers, appointed for an initial term ending July 30, 1994.

(b) **Subsequent Terms.** The composition of the Professional Conduct Board shall be maintained by the appointment of fourteen (14) lawyers and seven (7) adult Idaho citizens who are not lawyers of like credentials as those appointed to initial membership on the Professional Conduct Board.

(c) **Officers.** The Board of Commissioners shall designate one (1) member as Chairman and another member as vice-Chairman.

The Chairman (and when designated by the Chairman, the vice-Chairman) shall have the following duties and responsibilities:

(1) Supervise the general functioning of disciplinary proceedings described by these Rules;

(2) With the approval of the Supreme Court, appoint hearing committees for any purpose provided by these Rules;

(3) Replace members of hearing committees as provided by Rule 503(f), or as otherwise may become necessary;

(4) Rule on any motions filed in matters not yet assigned to a hearing committee; and

(5) Call meetings of the Professional Conduct Board or its subcommittees, as from time-to-time may be necessary.

(d) **Quorum.** Eleven (11) members of the Professional Conduct Board, including at least three (3) non-lawyer members, shall constitute a quorum. All decisions of the Professional Conduct Board must be by majority vote of those present. With approval of the Board of Commissioners, the PCB may create sub-committees for the transaction of any specified type of business, in which case a quorum shall be at least a majority of the members of that subcommittee.

(e) **Compensation and Expenses.** Members shall receive no compensation for their services but may be reimbursed for their travel and other reasonable expenses incidental to the performance of their duties.

(f) **Conflict of Interest.** Professional Conduct Board members shall refrain from taking part in any proceedings in which a judge, similarly situated, would be required to abstain. If, in any given case, the number of Professional Conduct Board members who may properly render a decision falls below a quorum, the Chairman of the Professional Conduct Board may appoint, for that

case only, the number of ad hoc members necessary to restore the Professional Conduct Board to full membership. Each ad hoc member shall fulfill all the responsibilities of the Professional Conduct Board member whom he or she replaces.

(g) **Vacancies.** Vacancies during a term shall be filled by the Board of Commissioners, with the approval of the Supreme Court, for the remainder of the unexpired term.

(h) The Professional Conduct Board itself, or through delegation to its Chairman, shall exercise the following powers and duties:

(1) Rule on procedural motions prior to the assignment of a matter to a hearing committee.

(2) Appoint from among its membership, with the approval of the Supreme Court, such hearing committees as may be necessary, including appointment of a committee chair.

(3) Assign professional conduct matters to hearing committees for hearing, with the approval of the Supreme Court.

(4) Appoint, with the approval of the Supreme Court, a hearing committee in cases in which misconduct is alleged against Bar Counsel.

(5) Impose and administer sanctions, through its hearing committees, as provided in Rule 506.

(6) Have its hearing committees submit findings and recommendations, together with the record of the proceedings before it, to the Supreme Court.

(7) Supervise its staff.

(8) Maintain permanent records of all matters brought before the Professional Conduct Board.

(9) Appoint a clerk, subject to approval by the Board of Commissioners.

(10) Review periodically the operation of the system with the Board of Commissioners.

(11) Submit annually a proposed budget to the Board of Commissioners.

(12) Adopt additional rules of procedure, subject to approval by the Board of Commissioners.

**(Rule 502 amended 5-29-91)*

***RULE 503. Hearing Committees**

*(a) **Establishment and Membership of Committees.** Each hearing committee shall consist of three (3) members of the Professional Conduct Board, two (2) of whom shall be members of the Idaho State Bar in good standing, and one (1) of whom shall be a non-lawyer.

**(Section (a) amended 3- 1-88 and 5-29-91)*

(b) **Powers and Duties.** Upon assignment of a professional conduct matter to a hearing committee by the Professional Conduct Board, the hearing committees shall have the power to:

(1) Rule upon procedural motions.

(2) Request further investigation of any matters assigned to it by the Professional Conduct Board.

(3) Review the actions of Bar Counsel and in such matters approve, modify or reject the same under the procedures provided in Rules 509.

(4) Conduct hearings on the formal review of a lawyer's professional conduct.

(5) Submit findings and recommendations, together with the record of the hearing, to the Supreme Court.

(6) Conduct any business it shall see fit by conference call.

(c) **Officers.** The Chairman of the Board shall designate one (1) member of a hearing committee as Chairman to preside over matters presented to the committee.

(d) **Quorum.** All members shall constitute a quorum for the purpose of hearing evidence and issuing findings and conclusions. All decisions of a hearing committee shall be by majority vote of the three committee members. By consent of the hearing committee, the committee chairman may be delegated to rule on motions or other procedural matters.

(e) **Compensation and Expenses.** Members of hearing committees shall receive no compensation for their services but may be reimbursed for their travel and other reasonable expenses incidental to the performance of their duties.

(f) **Conflict of Interest/Additional Members.** Hearing committee members shall refrain from taking part in any proceedings in which a judge, similarly situated, would be required to abstain. If hearing committee members are unable to continue service on a hewing committee, the Chairman of the Professional Conduct Board may appoint the additional members necessary to restore the committee to full membership. Substitute members shall familiarize themselves with the record of the proceeding, and such substitution shall -not be grounds for restarting a matter.

(g) **Vacancies.** Vacancies during a term shall be filled by the Board of Commissioners, with the approval of the Supreme Court, for the remainder of the unexpired term.
*(Rule 503 amended 5-29-91)

RULE 504. Bar Counsel

(a) **Appointment and Qualifications.** Bar Counsel shall be appointed by the Board of Commissioners and shall be a member in good standing of the Idaho State Bar.

*(b) **Powers and Duties.** With respect to the review of a lawyer's professional conduct, Bar Counsel shall have the following powers and duties:

(1) To appoint such staff, and to incur such expenses as may be necessary to the performance of his or her duties, subject to budgetary considerations and to the approval of the Board of Commissioners.

(2) To investigate all matters involving possible mis conduct called to the attention of Bar Counsel.

(3) To disregard or dismiss a matter as unfounded, frivolous or beyond the purview of these Rules and discontinue the investigation and proceedings concerning the matter; to informal admonitions; to issue private reprimands, to impose probation; to require restitution; to impose costs; and to recommend to the Board of Commissioners the riling of formal charges in all matters in which Bar Counsel deems such action warranted.

(4) To prosecute all professional conduct review proceedings before hearing committees of the Professional Conduct Board and the Supreme Court.

(5) To prosecute all reinstatement proceedings before the hearing committees, the Professional Conduct Board and the Supreme Court.

(6) To maintain permanent records of professional conduct review matters and compile statistics to aid in the administration of the system.

(7) To perform all other duties and functions as may be required by these Rules or by the Board of Commissioners.

**(Section (b) amended 5-29-91)*

*(c) Except in matters where a grievance is disregarded because it is frivolous and clearly unfounded on its face, or falls outside the jurisdiction of said committee and the Professional Conduct Board, no disposition shall be recommended or undertaken by Bar Counsel until the defendant shall have been afforded the opportunity to respond to the allegations.

**(Section (c) amended 8-31-95 - effective 4-25-95)*

RULE 505. Grounds for Sanctions. The following shall constitute misconduct and shall be grounds for imposition of sanctions:

*(a) **General.** Acts or omissions by a lawyer, individually or in concert with any other person or persons, which violate the Idaho Rules of Professional Conduct as amended, or any other ethical canon or requirement adopted by the Idaho Supreme Court whether or not the acts or omissions occurred in the course of an attorney-client relationship.
**(Section (a) amended 5-29-91)*

*(b) **Criminal Conduct**. Commission of a serious crime or other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Failure to report a conviction pursuant to Rule 512(b) shall also constitute grounds for imposition of sanctions.
**(Section (b) amended 3-1-88, and 4-14-93 - effective 7-1-93)*

(c) **Reciprocal Sanctions.** Conduct which results in the imposition of sanctions by another jurisdiction or by another professional authority.

*(d) **Violation of Rules and Orders.** Violation of any rule or order imposed as a result of review of a lawyer's professional conduct.
**(Section (d) amended 5-29-91)*

(e) **Failure to Respond to Disciplinary Authorities.** Failure to respond to a request from the Supreme Court, the Professional Conduct Board, a hearing committee or Bar Counsel, or failure to assert the grounds for refusing to so respond.

*(f) **Failure to Properly Discharge Duties of Supervisory Attorney.** As provided by Rule 221(n), failure to properly dis-

charge the duties of a supervisory attorney for a legal intern shall be the basis for discipline.
**(Section 09 added 3-1-88)*

RULE 506. Sanctions. Disciplinary sanctions may consist of any one or more of the following:

(a) **Disbarment.** Disbarment is the revocation of admission to the Idaho State Bar. A lawyer disbarred in this state who desires to again be admitted shall comply with all bar admission requirements found in Section 11 of these Rules. A disbarred lawyer making such application shall have the burden of overcoming the rebuttable presumption of "unfitness to practice law". In no event shall a disbarred lawyer make application for admission to the Bar sooner than five (5) years from the effective date of disbarment.
**(Section (a) amended 5-29-91)*

(b) **Suspension.** Suspension is the denial of the right to practice law in the State of Idaho for a specific period of time not to exceed five (5) years, and thereafter until reinstatement as provided for by these Rules.

*(c) **Probation.** Probation is the continued right to practice law subject to such conditions as may be imposed by the Supreme Court or as may be imposed by the Professional Conduct Board or Bar Counsel.

(1) Probation may be imposed only in those cases in which there is little likelihood that the defendant will harm the public during the period of probation and the conditions of probation can be adequately supervised.

(2) Only the Supreme Court can impose conditions of probation which limit the lawyer's license to practice law.

**(Section (c) amended 3-1-88)*

(d) **Public Censure.** Public censure is an official, written reprimand imposed by the Supreme Court, which censure shall be published in the official Idaho State Bar publication, a newspaper of general circulation in the judicial district where the attorney maintains his or her principal place of business; and in the Idaho Reports.

*(e) **Public Reprimand.** Public reprimand is public, verbal and written discipline imposed by the Professional Conduct Board or its designee, which declares the defendant's conduct to have been improper but does not limit his or her right to practice law in the State of Idaho and which shall be published in the official Idaho State Bar publication.
**(Section (e) amended 5-29-91)*

*(f) **Private Reprimand.** Private reprimand is private, verbal and/or written discipline imposed by Bar Counsel, which declares the defendant's conduct to have been improper but does not limit his or her right to practice law in the State of Idaho and which becomes a part of the defendant's permanent files but is not published.

*(g) **Informal Admonition.** Informal admonition is private, written discipline imposed by Bar Counsel, which declares the defendant's conduct to have been in violation of the Rules of Professional Conduct and which is included in the lawyer's permanent files, but which is not published. An informal admonition is lesser in scope than a private reprimand, and is the least severe form of discipline available.
**(Sections 69 & (g) amended 3-1-88)*

*(h) **Restitution.** Restitution is the payment of a loss or losses to persons financially injured and/or reimbursement to the clients' security fund for claims paid from the fund which losses or claims are a result of the lawyer's misconduct. Restitution may be imposed as a condition of any probation and in conjunction with any sanc-

tion.

*(i) Imposition of Costs. Assessment of the expenses and costs of professional conduct investigations and proceedings may be imposed as part of any other sanction.
**(Sections (h) & (i) amended 5-29-91)*

*(j) Unless or until an attorney who has been disbarred or suspended has been reinstated to the practice of law in Idaho he or she:

(1) shall not use any sign or advertise that he or she, either alone or with any other person, has, owns, conducts or maintains a law office or office of any kind for the practice of law, or that he or she is entitled to practice law, and he or she shall promptly remove any sign indicating the same;

(2) shall not use any stationery, bank accounts or checks whereon his or her name appears as a lawyer or attorney at law or in connection with the words "law office';

(3) shall promptly remove his or her listing from any telephone directory indicating that he or she is a lawyer or attorney or holds a similar title;

(4) shall promptly contact the publishers of Martindale-Hubbell law directory and any other listing in which his or her name appears and cause the removal of any listing which states that he or she is a member of the Idaho State Bar in good standing;

(5) shall comply with the provisions of Idaho Code section 30-1309, concerning membership and participation in professional service corporations; and

(6) shall desist and refrain from the practice of law in any form either as principal, agent, servant, clerk, or employee of another and shall not appear as an attorney before any court, justice, judge, board,

commission, division or other public authority or agency and shall not share in any fee for legal service performed by himself or herself, or any other attorney during the period of his or her suspension.

**(Section 6) added 5-29-91 & amended 8-31-95-effective 4-25-95)*

RULE 507. Withheld Sanctions

(a) The following sanctions imposed under these Rules may provide for withholding all or part of the terms of that sanction, contingent upon the Defendant's observance of specified conditions:

(1) suspensions,
(2) public censures,
(3) public reprimands, or
(4) court-ordered probation.

*(b) **Motion for Order to Show Cause.** Upon violation of conditions of withheld sanction, Bar Counsel may file a Motion for Order to Show Cause with the Professional Conduct Board.

(1) The motion shall allege that the lawyer has not abided by the conditions set forth in the Supreme Court order disciplining the lawyer.

(2) The motion shall be served upon:
  (A) the lawyer at his or her last known address, and
  (B) the lawyer's counsel of record.

(3) The Chairman of the Professional Conduct Board, with the approval of the Supreme Court, shall appoint a Hearing Committee, which shall schedule a hearing to ascertain the truth of the allegations set forth by the motion.

(4) The Bar shall have the burden of proof that the lawyer has failed to adhere to the conditions set forth in the Supreme Court's disciplinary order.

(5) In the event the Bar carries said burden of proof, the Professional Conduct Board may recommend that the withheld sanction be imposed.

*(c) **Findings.** Upon making findings and recommendations on the Order to Show Cause, the Clerk of the Professional Conduct Board shall submit the Hearing Committees findings and recommendations to the Supreme Court as provided for in subsections (o-r) of Rule 511 of these rules and the matter shall thereafter be handled as provided for by those sections.
**(Sections (b) & (c) amended 5-29-91)*

(d) **Publication.** Sanctions which are withheld under this rule shall be published in accordance with these rules as if the sanction had not been withheld.

***RULE 508. Petitions Against Members of the Board of Commissioners, Professional Conduct Board, Committees, or Bar Counsel**

(a) **Board of Commissioners - Professional Conduct Board.** Grievances alleging grounds for imposition of sanctions as provided in Rule 505 of these Rules against a member of the Board of Commissioners, a lawyer member of the Professional Conduct Board or alleging misconduct of any non-lawyer member of the Professional Conduct Board in the performance of his or her duties under these Rules shall be submitted directly to the Supreme Court.

(b) **Bar Counsel.** Grievances alleging grounds for imposition of sanctions as provided in Rule 505 of these Rules against Bar Counsel in the performance of his or her duties under these Rules, shall be submitted directly to the Professional Conduct Board, which, with the approval of the Supreme Court, shall appoint a Hearing Committee to consider the complaint. Upon receipt of a complaint against Bar Counsel under this section, a Hearing Committee may:

(1) Consider the matter on the basis of the complaint; and/or

(2) Require Bar Counsel to make a response; and/or

(3) Appoint an investigator and/or

(4) Issue an Order from among the options listed in Rule 509(a)(1-7); and/or

(5) Take such other steps as are necessary to facilitate the prompt resolution of the complaint.

*(Rule 508 amended 5-29-9 1)

RULE 509. Investigation and Preliminary Proceedings

(a) **Investigation - Disposition by Counsel.** All investigations shall be conducted by or under the authority and direction of Bar Counsel. Upon such investigation as Bar Counsel deems appropriate, he or she may:

(1) Disregard the matter as unfounded, frivolous or beyond the purview of these Rules and discontinue the investigation and proceedings concerning the matter; or

(2) Issue an informal admonition to defendant; or

(3) Issue a private reprimand to defendant; or

(4) Impose probation as provided by Rules 506(c) either as an independent sanction or in conjunction with actions taken under subsection 2 or 3 above; or

(5) Impose restitution as provided by Rule 506(h), either as an independent sanction or in conjunction with actions taken under subsection 2, 3 or 4 above; or

(6) File formal charges, with concurrence of the Board of Commissioners; or

(7) Seek, in appropriate circumstances, transfer to dis ability inactive status under Rule 516.

*(b) **Notice of Disposition.** Bar Counsel shall give written

notice to the grievant and to the defendant of his or her disposition of matters under Rule 509(a), stating the reasons for the action taken.

**(Sections (b) amended 5-29-91)*

*(c) Request for Review. Either the grievant or the defendant may request review by a hearing committee pursuant to this Rule of Bar Counsel's disposition under subsections (a)(1). (2), (3), (4) or (5) in the following manner:

(1) **Mode and Content of Request.** A written request for such review, stating the reasons for the request, shall be filed with the Clerk of the Professional Conduct Board.

(A) **Time for Filing.** The request for review shall be filed within fourteen (14) days following the receipt by the grievant or defendant of notice under subsection (B) of this Rule.

(2) **Service of Request.** The written request shall be served upon Bar Counsel and the defendant or grievant.

(3) **Assignment to Hearing Committee.** The Clerk of the Professional Conduct Board shall forward a copy of the request, together with the official file concerning the matter to the Chairman of the Professional Conduct Board for assignment to a hearing committee.

(A) **Notice of Assignment.** Upon the assignment of a hearing committee, the Chairman shall cause the Clerk to service notice of the assignment upon the grievant; defendant and Bar Counsel.

(4) **Review by Hearing Committee.** The hearing committee shall review the matter upon the record before it, unless either party requests a hearing. If the party seeking review of the decision desires

such a hearing, he or she shall so state in the request for review. If any other party desires a hearing, he or she shall make a request, in writing, to the Clerk of the Professional Conduct Board within seven (7) days of being served with the request for review. The hearing committee shall review the existing record prior to holding a hearing, if one is requested. If a hearing is held, the parties shall be permitted to offer non-duplicative testimony or evidence, and may file briefs and make oral argument. Presentation may be limited, in the discretion of the committee.

(5) Decision. The hearing committee, following its review, may:

(A) approve Bar Counsel's disposition; or

(B) reject Bar Counsel's disposition; or

(C) modify Bar Counsel's disposition; or

(D) recommend the filing of formal charges.

(6) Time for Rendering Decision. The hearing committee shall render its decision within twenty-one (21) days following the date upon which the matter is assigned to it for review - except in the event a hearing is held as set forth in (c)(4) above, the committee shall render its decision within ten (10) days following said hearing.

(7) Service of Decision. The hearing committee shall enter an appropriate order reflecting its decision and file the same with the Clerk of the Professional Conduct Board who shall then serve the order upon grievant, defendant and Bar Counsel.

(8) Effect of Hearing Committee Decision. Unless the hearing committee remands the matter for further investigation or recommends the filing of formal charges, its review of Bar Counsel's disposition shall be final, unless the grievant and/or the

defendant seek Supreme Court review, as provided by subsection (9) below. If the filing of formal charges is recommended by the hearing committee, subsequent proceedings shall be processed as provided in Rule 511.

(9) Supreme Court Review. The grievant and/or the defendant may seek Supreme Court review of a hearing committee decision made pursuant to subsection (5) above. A written petition for such review, stating the reasons for the request, shall be filed with the Clerk of the Supreme Court, within twenty-one (21) days of service of the decision. The petition shall contain a simple statement of the reasons the petitioner believes that the hearing committee decision is clearly erroneous or arbitrary and capricious. If requested through motion or the defendant, the Court Clerk shall substitute "Defendant A" for the defendant's name, and all parties shall be instructed to use that designation in subsequent briefs and pleadings.

**(Section (9) amended 2- 7-9 7)*

**(Sec. (c) amended 5-29-91, 4-13-94 (effective 7-1-94); & 9-19-96)*

RULE 510. Interim Suspension

(a) **Grounds.** The Supreme Court may enter an order of interim suspension if.

(1) it clearly appears from specific facts shown by affidavit that the defendant or respondent poses a substantial threat of irreparable harm to the public; and

(2) the alleged conduct, if true, would subject the lawyer to sanctions under Rule 505 or to transfer to disability inactive status as provided in Rule 516.

*(b) **Petition for Interim Suspension.** At any time, Bar

Counsel may file a petition with the Supreme Court, supported by affidavit setting forth the specific facts upon which the petition is based, requesting that the lawyer be placed on interim suspension. A Hearing Review Committee may also direct the filing of a petition for interim suspension, as provided by Rule 511 (m).

*(c) **Petition for Dissolution or Amendment.** The defendant or respondent may file a petition for-dissolution or amendment of an order of interim suspension with the Supreme Court.

(1) Mode and Content of Petition. The petition shall be in writing, supported by affidavits setting forth specific reasons why the petition should be dis solved or amended.

(A) Service of Petition. A copy of the petition, together with the supporting affidavits, shall be served upon the Bar Counsel as provided in Rule 523(a).

(2) Time for Filing. The petition for dissolution or amendment may be filed at any time following the entry of the Court's order of interim suspension.

*(d) **Court Action.** The Supreme Court may:

(1) order interim 'suspension upon the petition and affidavit; or

(2) deny the petition for interim suspension upon the petition and affidavit; or

(3) make an order of reference pursuant to Rule 522(g); or

(4) schedule the matter for oral argument.

*(e) **Injunction on Maintenance of Trust Funds.** Any order of interim suspension which restricts the defendant's or respondent's maintenance of a trust account in connection with his or her practice of law, when served on any bank maintaining such trust account shall serve as an injunction to prevent said bank from making further payment from such trust account or accounts except in

accordance with restrictions stated in the order.
**(Sections (b) - (e) amended 5-29-91)*

*(f) **Recommendation by Hearing Committee.** Whenever a Hearing Committee concludes, that a petition for interim suspension should be riled, pursuant to Rule 51 1(m), it shall direct Bar Counsel to file such a petition. The record of the disciplinary proceeding, or any part thereof, may be offered in lieu of the affidavits required by subsection (b), although additional evidence of matters not raised in the disciplinary proceeding also may be offered by affidavit.
**(Section 69 added 5-29-91)*

RULE 511. Formal Proceedings

(a) Complaint. Bar Counsel shall institute formal proceedings by filing a complaint with the Clerk of the Professional Conduct Board. The allegations of the complaint must be specific enough to inform the defendant of the alleged misconduct.

(1) **Concurrence by Board of Commissioners.** Before a complaint shall be filed against a lawyer by Bar Counsel, the Board of Commissioners must make a finding of probable cause and approve the filing of formal charges.

(2) **Service.** A copy of the complaint shall be served upon the defendant pursuant to Rule 523(a).

*(b) **Assignment to Hearing Committee.** Immediately upon the filing of a formal complaint, the Chairman of the Professional Conduct Board, with the approval of the Supreme Court, shall assign a Hearing Committee to conduct the matter. The PCB Chair shall designate one member of the Hearing Committee as committee chair, who will thereafter preside over all Committee business.
**(Section(b) added5-29-91)*

*(c) **Answer.** The defendant shall file his or her answer with

the Clerk of the Professional Conduct Board and serve the answer upon Bar Counsel within twenty-one (21) days after service of the complaint.

*(d) **Motion to Deem Admissions.** In the event defendant fails to answer the complaint within the prescribed time, Bar Counsel shall file, and serve upon the defendant as provided in Rule 523(b), appropriate papers requesting the charges in the Complaint be deemed admitted and immediate imposition of sanctions with the Clerk of the Professional Conduct Board.

(1) **Motion to File Late Answer - Grounds.** The allegations contained in the complaint shall be deemed admitted unless defendant has filed, and served upon Bar Counsel as provided in Rule 523(b), a motion with the Clerk of the Professional Conduct Board requesting permission to file an answer to the complaint upon the grounds that his or her failure to answer is attributable to mistake, inadvertence, surprise or excusable neglect.

(A) The Clerk of the Professional Conduct Board shall forward the request for imposition of sanctions, and the motion for permission to answer, if any, to the Chairman of the Hearing Committee.

*(e) **Hearing on Motions - Notice.** The Chairman, in his or her discretion, may set the motions for hearing in which event he or she shall cause the Clerk of the Professional Conduct Board to serve written notice of the date, time, and place for such hearing.

*(f) Upon receipt of the motion to deem admitted and for imposition of sanctions, the Chairman of the Hearing Committee shall enter an order:

(1) granting the motion to deem admitted and for imposition of the requested sanctions, if no motion to file a late answer has been filed by defendant; or

(2) denying the motion to deemed admitted and for imposition of requested sanctions; or

(3) setting the motions for hearing.

(A) Time for Ruling. The Chairman shall rule upon the motion filed by Bar Counsel and any motions filed by Defendant within fourteen (14) days following his or her receipt of the motions.

(B) Service. The Chairman shall forward his or her decision to the Clerk of the Professional Conduct Board, directing the Clerk to serve the same upon defendant and Bar Counsel. In the event the motions are set for hearing, the Clerk shall serve notice of the date, time and place of the hearings upon defendant and Bar Counsel.

**(Sections (c) - (f) amended 5-29-91)*

(g) **Conflict of Interest.** A hearing committee which, pursuant to Rule 509, has reviewed Bar Counsel's disposition of a matter, shall 11. not take part in any formal proceedings regarding that matter.

*(h) **Scheduling Order.** Within twenty-one (21) days after the Defendant has filed an answer, the chairman of a Hearing Committee shall hold a scheduling conference with the parties, for the purpose of establishing timetables for the completion of the case. Thereafter, the Chairman shall issue a scheduling order, declaring discovery deadlines, trial dates and any other significant dates for the conduct of the matter. Although not jurisdictional, the Committee chair should seek to conduct the matter so that the trial is held within 120 days from the original filing of the complaint.
**(Section (h) added 5-29-91)*

(i) **Place of Hearing.** Defendant has the right to have the hearing held in the county of his or her residence provided he or she has

requested the same in his or her answer; otherwise, the hearing shall be at the place designated by the Chairman of the Professional Conduct Board.

(j) **Manner of Hearing.** The hearing shall be conducted in the manner usual to District Courts of the State of Idaho and may be continued from time to time as the hearing committee, in its discretion, may permit.

*(k) **Judicial Notice.** The committee may take judicial notice of facts entitled to such notice; provided, however, that the facts judicially noticed shall be specified by the committee either at the time of the hearing or at the time of declaring its findings, whichever it deems appropriate.

*(l) **Hearing Committee Findings and Recommendations.** In every matter assigned to it for hearing and unless the defendant has consented to the imposition of sanctions as provided in Rule 514, the hearing committee shall issue a report containing its findings and recommendations.

(1) **Service on Parties.** The Hearing Committee shall serve its findings and recommendations upon each party within twenty-eight (28) days following the conclusion of the hearing.

(2) **Motion to Alter or Amend.** A Motion to Alter or Amend the findings and recommendations of a Hearing Committee may be made by either party, not later than fourteen (14) days after those findings and recommendations have been served upon the parties. The Hearing Committee shall consider the motion, and shall, within fourteen days of receipt of the motion:

(A) Alter or Amend its findings and recommendations; or

(B) Deny the Motion; or

(C) Schedule the matter for a hearing.

(3) **Filing with PCB Clerk.** The Hearing Committees report shall be filed with the PCB Clerk fourteen (14) days following service of those findings and recommendation upon the parties, or if a Motion to Alter or Amend has been filed, within fourteen (14) days following disposition of that Motion. The Clerk shall immediately serve a copy of the final findings and recommendation upon the parties.

(4) **Recommendation of Public Reprimand.** If the final findings and recommendations of the Hearing Committee are for the imposition of a Public reprimand as provided in Rule 506(e), that decision will become final, unless either party seeks Supreme Court review. To obtain Supreme Court review of a recommendation for Public Reprimand, a party must file a request for review with the Clerk of the Professional Conduct Board within fourteen (14) days of its receipt of the Hearing Committee's final findings and recommendations, as provided in subsection (3) above. If such a request for review is filed, the Clerk shall proceed under subsection (1)(5) of this Rule. In the event no request for review of the findings and recommendations of the Hearing Committee for imposition of Public reprimand are filed as provided in this Rule, the defendant shall appear before the Professional Conduct Board at a time and place fixed by the Chairman for the issuance of the reprimand provided under Rule 506(e). The Chairman shall deliver the reprimand, unless the Chairman, in his or her discretion, requires the defendant to appear at a time and place certain before a designated lawyer or hearing committee whom he or she has authorized and directed to deliver the particular reprimand on

behalf of the Professional Conduct Board. Following the issuance of the reprimand, notice of the reprimand shall be published as provided in Rule 506(e),

(5) **Recommendation for Public Censure, Suspension or Disbarment; Filing with Supreme Court.** The Clerk of the Professional Conduct Board shall transmit Hearing Committee final findings and recommendations which recommend a Public Censure, Suspension or Disbarment to the Supreme Court, together with the entire record of the proceeding.

**(Sections (k) & (1) amended 5-29-91)*

*(m) **Interim Suspension.** At any point after the filing of a formal complaint, a Hearing Committee may direct Bar Counsel to petition the Supreme Court for an order of Interim Suspension, as provided in Rule 510. In all cases in which a Hearing Committee recommends suspension or a disbarment, its opinion shall recommend to the Supreme Court whether the defendant should be immediately suspended from the practice of law, pending Supreme Court resolution of the matter. The Hearing Committee shall base all recommendation concerning interim suspension upon the criteria set forth in IBCR 510(a)(1).

*(n) **Notice of Objection; Briefs.** Within twenty-one (21) days following the filing in the Supreme Court of findings and recommendations for Public Censure, Suspension or Disbarment, described in subsection (1)(5) above, either party may file a Notice of Objection with the Court. Said Notice of Objection shall be a brief statement indicating that the party intends to contest the findings and recommendation of the Hearing Committee. Thereafter, the objecting party shall state its specific objections in an Opening Brief, to be filed within twenty-eight days after filing the Notice of Objection. The opposing party shall thereafter have twenty-one (21) days to file a Responding Brief, and the objecting party may

thereafter, within fourteen (14) days, file a Reply Brief. If both parties file a Notice of Objection, the Defendant lawyer shall file the Opening Brief.
**(Sections (m) & (n) added 5-29-91)*

*(o) **Review by Court.** After the filing of the record and Notices of Objection, if any, with the Supreme Court, the proceedings shall be in accordance with the following procedures:

(1) **No Notice of Objection.** In the event no Notices of Objection are filed, the Supreme Court shall promptly enter an appropriate order unless the Court, in its discretion, determines that submission of briefs and oral argument are required, in which event the Court shall notify defendant and Bar Counsel of the dates and times for submission of briefs and the date of oral argument.

(2) **Notice of Objection.** In the event a Notice of Objection to the findings and recommendations of the Hearing Committee is filed, the parties shall file briefs as provided in subsection (n) above. Oral argument, if desired by the Supreme Court. shall be at a time and place scheduled by the Supreme Court. Following the conclusion of its consideration of the matter, with or without oral argument the Court shall promptly enter and appropriate order.

*(p) **Alternative Procedure.** In lieu of the procedures prescribed in this Rule, the Defendant may file a tender of conditional admission pursuant to Rule 514 of these Rules.
**(Sections (o) & (p) amended 5-29-91)*

***RULE 512. Lawyers Convicted of Crimes**

(a) **Transmittal of Certificate of Conviction by Clerk of Trial Court.** The clerk of any court in this state in which a lawyer

is convicted of a crime shall within seven days after the conviction transmit a certified copy of the judgment of conviction to Bar Counsel.

*(b) **Lawyer's Duty To Report.** Any member of the Idaho State Bar convicted of a serious crime in any jurisdiction shall report that fact to the Idaho State Bar within fourteen days of the occurrence of that conviction. Failure to make such a report shall, in itself, constitute a disciplinary violation.
**(Section (b) added 4-14-93 - Effective 7-1-93)*

(c) **Determination of "Serious Crime".** Upon being advised that a lawyer subject to the disciplinary jurisdiction of this court has been convicted of a crime, disciplinary counsel shall determine whether the crime constitutes a "serious crime" warranting immediate interim suspension. If the crime is a "serious crime," disciplinary counsel shall prepare an order for interim suspension and forward it to the court and the respondent with a certificate of the conviction. Disciplinary counsel shall in addition file formal charges against the respondent predicated upon the conviction. On or before the date established for the entry of the order of interim suspension the lawyer may assert any jurisdictional deficiency that establishes that the suspension may not properly be ordered, such as that the crime did not constitute a "serious crime" or that the lawyer is not the individual convicted. If the crime is not a "serious crime," counsel shall process the matter in the same manner as any other information coming to the attention of the agency.

(d) **Definition of "Serious Crime".** "Serious Crime " is defined in Rule 501 (s).

(e) **Immediate Interim Suspension.** The court has exclusive power to place a lawyer on interim suspension.

(1) **Imposition.** The court may place a lawyer on interim suspension immediately upon proof that the lawyer has been convicted of a serious crime

regardless of the pendency of any appeal.

(2) **Termination.** The court has exclusive power to terminate an interim suspension. In the interest of justice, the court may terminate an interim suspension at any time after a hearing upon reasonable notice.

(f) **Conviction as Conclusive Evidence.** A certified copy of a judgment of conviction constitutes conclusive evidence that the lawyer committed the crime, and the sole issue in any hearing regarding the conviction shall be the nature and extent of the discipline to be imposed.

(g) **Automatic Reinstatement from Interim Suspension upon Reversal of Conviction.** If a lawyer suspended solely under the provisions of paragraph (d) demonstrates that the underlying conviction has been reversed or vacated, the order for interim suspension shall be vacated and the lawyer placed on active status. The vacating of the interim suspension will not automatically terminate any formal proceeding then pending against the lawyer, the disposition of which shall be determined by the hearing committee and the board on the basis of the available evidence other than conviction.

(h) **Notice to Clients and Others on Interim Suspension.** An interim suspension under this rule shall constitute a suspension of the lawyer for the purpose of IBCR 517.

**(Rule 512 rescinded and replaced 2-13-92 - Effective 7-1-92)*

RULE 513. Reciprocal Sanctions

(a) Duty of Lawyers. All lawyers subject to the provisions of these Rules, upon being sanctioned as a result of a review of his or her professional conduct in another jurisdiction or by another authority regulating professional conduct, shall inform Bar Counsel promptly of such action.

(b) **Certificate of Sanctions - Order to Show Cause.** Upon being informed that a lawyer subject to the provisions of these Rules has been sanctioned as a result of a review of his or her professional conduct in another jurisdiction or by another authority regulating professional conduct, Bar Counsel shall:

(1) obtain a certified copy of such sanctions and forward a copy thereof to the affected lawyer; and

(2) seek immediately an ex parte order directing the lawyer to show cause, if any he or she has, why the identical sanction in the State of Idaho would be unwarranted and the reasons therefor.

*(c) **Assignment to Hearing Committee.** The Chairman, simultaneously with issuing an order to show cause, shall, subject to approval of the Supreme Court, assign the matter to a hearing committee to receive the evidence on show cause.

(1) **Hearing on Show Cause.** The hearing committee shall schedule a hearing on the order to show cause within twenty-one (21) days following issuance of the Chairman's order.

(2) **Failure to Appear for Show Cause.** In the event the lawyer fails to appear before the hearing committee to show cause why identical sanctions should not be imposed in Idaho, the hearing committee shall file its findings and recommendations with the Clerk of the Professional Conduct Board and cause the Clerk to forward a copy of the findings and recommendations, together with the record before the committee, to the Supreme Court. A copy of the committee's findings and recommendations shall be served upon the defendant and Bar Counsel.

**(Section (c) amended 5-29-91)*

(d) **Effect of Stay of Discipline in Other Jurisdiction.** In the event the discipline imposed in the other jurisdiction has been

stayed there, any reciprocal discipline imposed in this state shall be deferred until the stay expires.

(e) **Effect of Final Adjudication in Other Jurisdiction.** A final adjudication in another jurisdiction that a lawyer has been guilty of misconduct shall be conclusive evidence of that misconduct in any proceeding against the lawyer under these Rules. In any formal proceeding before a hearing committee, the only issues to be determined shall be:

(1) Whether the lawyer was afforded due process in the issuing jurisdiction; and

(2) The extent of the final disposition to be imposed in the State of Idaho.

RULE 514. Imposition of Sanctions by Consent.
The sanctions provided by Rule 506 may be imposed by mutual consent as follows:

(a) **Private Sanctions.** A lawyer whose professional conduct is under investigation may tender a conditional admission of misconduct in exchange for the imposition of a stated private sanction. The tender shall be submitted in writing prior to the filing of formal charges to Bar Counsel who may either accept or reject the same. If the tender is accepted, Bar Counsel shall impose the stated private sanction. If the tender is rejected, the proceeding shall be processed in accordance with these Rules.

*(b) **Public Sanctions.** After formal charges have been filed against a lawyer, he or she may tender a conditional admission of misconduct, as charged, in answer to the complaint or to a particular count thereof in exchange for the imposition of a stated form of public sanction. The tender shall be submitted and processed in the following manner:

(1) **Submission of Tender.** The defendant shall file the tender, in writing, with the Clerk of the Board committee and serve the same upon Bar Counsel.

(2) **Objections to Tender.** Bar Counsel shall have seven (7) days following service of the tender to file any written objections he or she may have to the tender.

(3) **Service on Committee.** The Clerk shall forward the tender and any objections to the hearing committee.

(4) **Committee Recommendations.** The hearing committee shall make its recommendation, in writing, to the Supreme Court as to whether the tender should be accepted or rejected. The hearing committees recommendation shall be filed with the Clerk of the Professional Conduct Board and served on the defendant and Bar Counsel.

(A) **Time for Filing.** The Committees recommendations shall be filed with the Clerk within fourteen (14) days following receipt of the tender of conditional admission and the objections of Bar Counsel, if any.

(5) **Continuance of Hearing Date.** A continuance in a hearing committee proceeding sought by defendant solely on the basis of such tender shall be granted only with concurrence of Bar Counsel.

(6) Action by Court. The Supreme Court shall enter its order approving or rejecting the stipulation without any hearing or further filings by the parties.

*(Section (b) amended 5-29-91)

*(c) **Affidavit to Accompany Tender.** A lawyer who consents to a stated form of discipline shall present to the Board and Bar Counsel an affidavit stating that he or she desires to consent to the discipline and that:

(1) his or her consent is freely and voluntarily rendered; he or she is not subject to coercion or duress; he or she is fully aware of the implications

of submitting his or her consent;

(2) he or she is aware that there is presently pending an investigation into, or proceeding involving, allegations that there exist grounds for his or her discipline, the nature of which he or she shall specifically set forth;

(3) he or she acknowledges that the material facts so alleged are true; and

(4) he or she submits his or her consent because he or she knows that if charges were predicated upon the matters under investigation were filed, or if the pending proceeding were prosecuted, he or she could not present a successful defense.

*(Section (c) amended 8-31-95-effective 4-25-95)

RULE 515. Related Pending Civil or Criminal Litigation

(a) **Stay or Abatement.** The substantial similarity of the material allegations of pending criminal or civil actions to alleged grounds for the imposition of sanctions shall not stay the filing nor abate the processing of a review of a lawyer's professional conduct under these Rules unless Bar Counsel shall request such action by the Professional Conduct Board, The Professional Conduct Board, in its discretion and for good cause shown, may order such stay or abatement.

(b) **Condition on Stay or Abatement.** The Professional Conduct Board may condition its order for stay or abatement upon such terms and conditions as the Professional Conduct Board, in its discretion, deems necessary.

RULE 516. Disability Inactive Status

(a) **Based on Judicial Declaration.** In the event a lawyer, hereinafter referred to as "respondent", has been judicially declared incompetent or involuntarily committed on the grounds of incom-

petency or disability, the clerk of the court by which such findings were made shall transmit to Bar Counsel within seven (7) days after its entry, a certified copy of the court's order; decision or judgment.

(1) **Petition.** Upon receipt of the courts order, decision or judgment, Bar Counsel shall petition the Supreme Court for its order transferring the respondent to disability inactive status based upon such certified copy of the order, decision or judgment.

(A) **Service.** A copy of the petition and judgment shall be served by Bar Counsel upon the respondent, his or her guardian, and/or the director of the institution to which he or she has been committed as provided in Rule 523(a).

(2) **Order of Supreme Court.** Upon receipt of the Petition and certified copy of the order, decision or judgment, the Supreme Court shall enter its order transferring the respondent to disability inactive status, unless it determines that the interest of justice requires otherwise.

(A) **Effective Date.** The order shall be effective immediately upon its entry and shall remain in effect until further order of the Supreme Court pursuant to the provision of subsection (f) of this Rule,

(B) **Service of Order.** A copy of the order transferring the respondent to disability inactive status shall be served, in such manner as the Supreme Court may direct, upon the respondent, his or her guardian and/or the director of the institution to which he or she has been committed and upon Bar Counsel.

(b) **Proceeding to Determine Status**

(1) **Petition.** The Board of Commissioners, upon reasonable cause shall direct Bar Counsel to petition the Supreme Court to determine whether the lawyer is unable to adequately practice law because of

(A) insanity;
(B) mental illness;
(C) senility;
(D) excessive use of alcohol or drugs; or
(E) other mental or physical incapacity.

(2) **Service.** A copy of the petition shall be served upon the lawyer by Bar Counsel concurrently with the filing of the Petition.

(3) **Action by Court.** Upon receipt of the petition the Supreme Court may take such action as it deems appropriate, including but not limited to:

(A) Reference of the matter to a person or committee for hearing and fact-finding pursuant to Rule 522(g);
(B) Provision for an examination of the respondent, at the expense of the Idaho State Bar, by such qualified medical experts as the Court, or any person or committee to which the matter has been referred, may designate; or
(C) Abatement upon its own motion or the motion of either party and unless the interest of justice or protection of the public requires otherwise, of any pending proceedings for review of the respondents professional conduct until the proceedings under this Rule are terminated.

(c) **Hearing after Reference.** The person or committee to which the matter is referred, shall set the matter for hearing and direct the Clerk to provide adequate, reasonable notice of the time,

date and place of the hearing to the respondent and Bar Counsel.

(1) **Appointment of Counsel.** In the event the respondent does not appear by counsel within fourteen (14) days of being notified of the proceedings, the Supreme Court or the Board of Commissioners may appoint counsel to represent the respondent in the proceedings.

(A) **Compensation of Counsel.** Counsel so appointed shall serve without compensation, except upon a showing to the Board of Commissioners that extra-ordinary services were necessarily tendered which require compensation. In the event appointed counsel makes the required showing, the amount of compensation for extraordinary services shall be determined by the Board of Commissioners, in its discretion, and such amount shall be paid to appointed counsel by the Idaho State Bar.

(B) **Expenses of Counsel.** Appointed counsel shall be reimbursed by the Idaho State Bar for the actual, reasonable expenses necessarily incurred by him or her in the proceedings.

(2) **Recommendation of Referee.** Following the hearing on the lawyer's competency, the referee shall file findings and recommendations, together with the record of proceedings before it, to the Clerk of the Professional Conduct Board and cause the findings and recommendations to be served upon the respondent and Bar Counsel. The report of the referee shall be transmitted to the Supreme Court.

(3) **Action by the Court.** If, after reviewing the proceedings and recommendations of the referee,

it is determined that the respondent is incapacitated from continuing the practice of law, the Supreme Court shall enter an order transferring him or her to disability inactive status for an indefinite period of time and until further order of the Court pursuant to subsection (e) of this Rule.

(A) **Effective Date of Order.** The Order shall be effective immediately upon its entry.

(B) **Service of Order.** A copy of the order shall be served, in such manner as the Court may direct, upon the respondent and Bar Counsel.

(d) **Notice of Transfer to Disability Status.** Notice of transfer to disability inactive status shall be provided to the clients and the public as follows:

(1) A person appointed to protect the interests of the lawyer and his or her clients pursuant to Rule 519 shall give, or cause to be given, notice to the respondent's clients, adverse parties, and other counsel in accordance with Rule .517.

(2) The Board of Commissioners shall:

(A) cause a notice of transfer to disability inactive status to be published in an appropriate legal journal or other publication and in a newspaper of general circulation in appropriate communities in each judicial district in which the respondent frequently practiced law or maintained an office for the practice of law; and

(B) transmit promptly a certified copy of the order of transfer to disability inactive status to the presiding judge of the court of each judicial district in which the respondent is entitled to practice law and shall request such action under the provisions of

these Rules, or otherwise, as may be indicated in order to protect the interests of the public, the lawyer and his or her clients.

*(e) **Reinstatement.** No attorney transferred to disability inactive status under the provision of this Rule may resume active status until reinstated by order of the Supreme Court.

(1) **Petition - Time of Filing.** A respondent who has been transferred to disability inactive status under the provision of this Rule shall be entitled to petition the Supreme Court for reinstatement to active status once a year, or at such shorter intervals as the Supreme Court may direct in the order transferring the respondent to disability inactive status or any modification thereof

(A) **Service of Petition.** Such petition shall be duly served upon the Board of Commissioners and Bar Counsel within seven (7) days after it is filed with the Supreme Court.

(2) **Response to Petition.** Bar Counsel shall have fourteen (14) days after service upon him or her to file a response, if any, to the petition.

(3) **After Judicial Declaration of Competency.** In the event the Respondent was transferred to disability inactive status pursuant to subsection (a) of this Rule and the petition for reinstatement is based upon a judicial declaration that the respondent is competent, a certified copy of which declaration accompanies the petition for reinstatement, the Supreme Court may dispense with further evidence concerning the removal of the respondent's disability and order his or her rein statement to active status upon such terms and conditions as the Court deems proper and

advisable.

(4) **After Finding of Incompetency of Supreme Court.** In the event the Respondent was transferred to disability inactive status pursuant to subsection (b) of this Rule, the Supreme Court may take such action as it deems appropriate, including, but no limited to:

(A) Reference of the matter to a person or committee for hearing and fact-finding pursuant to Rule 522(g);

(B) Provision for an examination of the Respondent, at his or her own expense, by such qualified medical experts as the Court, or any person or committee to which the matter is referred, shall designate.

(5) **Burden of Proof.** The burden of proof in a proceeding seeking transfer to disability inactive status or seeking reinstatement to active status following transfer to such status shall be by clear and convincing evidence and the burden of proving that relief is wan-anted shall be upon the party filing the petition.

(6) **Waiver of Doctor-Patient Privilege.** The filing of a petition for reinstatement to active status by an attorney transferred to disability inactive status because of disability or incapacity shall be deemed to constitute a waiver of any doctor-patient privilege or right of, confidentiality with respect to any treatment of the respondent during the period of his or her disability or his or her diagnosis during said time or at the time of the proceeding on the petition for reinstatement Privilege shall also be deemed waived by such petition with respect to any other health care or medical history during any other period of time to the extent the same may be

relevant or may lead to relevant evidence.

(A) **Required Disclosure.** The respondent shall be required to disclose the name of every psychiatrist, psychologist, physician, and hospital or other institution or health care provider by whom or in which the respondent has been examined or treated since his or her transfer to dis ability inactive status.

(B) **Consent to Disclosure of Information.** The respondent shall furnish to the Supreme Court written consent to each person, hospital or institution to divulge such information and records as court-appointed medical experts may request.

(7) **Hearing before Referee.** The person or committee to which the matter is referred, shall set the matter for hearing and direct the Clerk to provide adequate, reasonable notice of the time, date and place of the hearing to the respondent and Bar Counsel.

(8) **Recommendation of Referee.** Following the hearing on the layer's competency, the referee shall file findings and recommendations, together with the record of proceedings before it, to the Clerk of the Professional Conduct Board and cause the findings and recommendations to be served upon the petitioner and Bar Counsel. The clerk shall transmit the recommendations to the Supreme Court.

(A) **Time for Filing.** The Referee shall file Findings and Recommendations with the Clerk of the Board within fourteen (14) days following conclusion of the hearing.

(9) **Order of Court.** If after reviewing the recommendations and proceedings before the referee, it is

determined that the respondent's disability has been removed and he or she is fit to resume the practice of law, the Supreme Court shall enter its order reinstating the lawyer to active practice upon such terms and conditions as the Court deems proper and advisable, including submission of proof by respondent that he or she has the competency and learning in the law required to actively engage in the practice of law, including certification by the Board of Commissioners that the respondent has successfully completed an examination for the admission to practice law in this state. A copy of the order shall be served, in such manner as the Supreme Court may direct, upon respondent and Bar Counsel.

**(Section (e) amended 5-29-91)*

(f) **Notice of Reinstatement.** Following entry of the Courts order reinstating respondent to active status, the Board of Commissioners shall:

(1) cause a notice of reinstatement to active status to be published in an appropriate legal journal or other publication and in a newspaper of general circulation in appropriate communities in each judicial district in which the Respondent frequently practiced law or maintained an office for the practice of law.

(2) transmit promptly a certified copy of the, order of reinstatement to active status to the presiding judge of the court of each judicial district in which the lawyer is entitled to practice law in this state prior to his or her transfer to disability inactive status.

Appendix N

RULE 517. Notice to Clients, Adverse Parties, Other Counsel and Public

(a) **Notice of Disqualification.** Notice of a Supreme Court order disqualifying a lawyer -from the practice of law in this state through interim suspension, suspension, disbarment, or transfer to disability inactive status, shall be given or caused to be given by the affected lawyer or a person appointed by the Court to:

(1) All clients being represented in pending matters;
(2) Any co-counsel in pending matters; and
(3) Any opposing counsel in pending matters; or
(4) All adverse parties in pending matters who. are not represented by counsel.

*(b) **Service of Notice.** The notice required by this Rule shall be given* by registered or certified mail, return receipt requested, as soon as practicable after the entry of the Court's order.
**(Section (b) amended 3- 1 -88)*

*(c) **Contents of Notice.** The notice shall state:

(1) The lawyer is disqualified to act as a lawyer in this state by reason of the order;
(2) The effective date of the order;
(3) The lawyer's residence or other ..address where communications can be sent;
(4) The place of residence of the client, in the case of notice to co-counsel, counsel for adverse parties, or an adverse party;
(5) The right of the client, and any counsel presently representing the client, to obtain any papers or other property to which they are entitled; and
(6) The times and places at which the papers and other property may be obtained, calling attention to any urgency in obtaining the papers and other property.

**(Section (c) amended 8-31-95-effective 4-25-95)*

(d) **Lawyer's Duties after Disqualification.** Unless otherwise specified, a Supreme Court order disqualifying a lawyer from the practice of law shall be effective upon date of entry, after which date defendant shall:

(1) not accept any new retainer or engage as a lawyer for another in any new case or legal matter of any nature. Unless the order otherwise specifies, the defendant shall have fourteen (14) days after the effective date of the order of disqualification to wind up and complete on behalf of any client, all matters which are pending on the entry date.

(2) refund any part of any fees paid in advance which have not been earned.

(3) move in any court, agency or tribunal in which a proceeding on behalf of a client is pending for leave to withdraw, if the client has not obtained another lawyer before the effective date of the Court's order of disqualification.

(A) **Service of Notice of Withdrawal.** The defendant shall file with the court, agency or tribunal before which the litigation is pending a copy of the notice to opposing counsel or adverse parties.

(4) file with the Court and serve upon Bar Counsel within fourteen (14) days an affidavit containing:

(A) a statement that he or she has fully complied with the provisions or the order and with these Rules;

(B) a list of all other state, federal and administrative jurisdictions to which he or she is admitted to practice; and

*(C) a residence or other address where communications thereafter may be sent.

**(Section (C) amended 8-31-95-effective 4-25-95)*

(e) **Notice to Public.** The Professional Conduct Board shall

give notice to the public of a lawyer's interim suspension, suspension, disbarment or transfer to disability inactive status by promptly:

(1) causing a notice of the disqualification to be published in an appropriate legal journal or other publication and in a newspaper of general circulation in appropriate communities in each judicial district in which the affected lawyer was entitled to practice law prior to his or her disqualification. and

(2) transmitting a certified copy of the order of dis qualification to the presiding judge of the court of each judicial district in which the affected lawyer was entitled to practice law prior to his or her dis qualification and requesting such action under the provisions of these Rules, or otherwise, as may be indicated in order to protect the interests of the public and the clients of the affected lawyer.

RULE 518. Reinstatement

(a) **Grounds for Reinstatement.**

(1) **Modification, Reversal or Vacation by Other Jurisdiction.** Another jurisdiction's modification, reversal or vacation of sanctions against a lawyer imposed by said jurisdiction, which sanctions were the sole basis for reciprocal sanctions shall constitute grounds for similar modifications, reversal or vacation of the sanctions imposed under Rule 513.

(A) **Effect.** Such modification, reversal or vacation shall have no effect upon sanctions imposed or proceedings currently pending based upon grounds other than reciprocity.

(2) **Vacation or Reversal of Criminal Conviction.** An appeal court's vacation or reversal of a lawyer's conviction of a "serious crime" or a trial court's entry of an order granting a motion for new trial, a motion for judgment of acquittal, or a motion to withdraw a plea of guilty which removes a lawyer's "conviction of a serious crime", which conviction was the sole basis for the imposition of sanctions under these Rules, shall constitute grounds for similar modification, reversal or vacation of the sanctions imposed under Rule 512.

(A) **Effect of Vacation or Reversal.** Such vacation, reversal or entry of an order shall have no effect upon sanctions imposed or proceedings currently pending based upon grounds other than the lawyer's conviction of a serious crime.

(3) **Suspension of 91 Days or Less.** A lawyer suspended for ninety-one (91) days or less must show that he or she has complied with all the terms and conditions of his or her suspension.

(4) **Suspension for more than 91 Days.** A lawyer suspended for more than ninety-one (91) days may be readmitted upon showing that he or she has the moral qualifications, competency and learning in the law for admission to practice law in the State of Idaho, that his or her resumption of the practice of law within the State of Idaho will not be detrimental to the integrity of the Bar, to the administration of justice or against the public interest, and that he or she has complied with all the terms of his or her suspension.

(b) **Time for Filing.**

(1) A petition for reinstatement by a suspended lawyer Subsection (a)(3) of this Rule may be filed at any

time.

(2) A petition for reinstatement by a suspended lawyer based upon other grounds may be filed no sooner than ninety-one (91) days prior to the end of his or her term of suspension.

(3) No petition for reinstatement under this Rule shall be filed within one (1) year following an adverse judgment upon a petition for reinstatement filed on behalf of the same lawyer.

(c) **Place of Filing.** Petitions for reinstatement by a suspended lawyer shall be filed with the Clerk of ..the Professional Conduct Board and served upon Bar Counsel.

(d) **Advance Cost Deposit.** Such petitions shall be accompanied by an advance cost deposit in an amount of not less than $1000 to cover anticipated costs of the reinstatement proceeding. The chairman of the Board may require payment of additional amounts in advance as, in his or her discretion, is necessary to complete all proceedings. Any advanced amounts not utilized in completing the proceedings shall be refunded immediately to the petitioner.

*(e) **Processing Petition.** Within fourteen (14) days following receipt of the petition, the Chairman of the Professional Conduct Board, with the approval of the Supreme Court, shall assign the petition to a hearing committee.

(1) **Hearing.** The hearing committee shall schedule a hearing to be held within a reasonable time but in no event less than (28) days after the matter is assigned to the committee.

(A) **Notice.** The Clerk of the Professional Conduct Board shall serve a copy of the notice of hearing upon petitioner and Bar Counsel at least fourteen (14) days in advance of the hearing, stating the date, time and place of hearing. The notice shall

advise the petitioner that he or she is entitled to be represented by counsel, to cross-examine witnesses and to present evidence in his or her own behalf.

(2) **Burden of Proof.** The suspended lawyer shall have the burden of demonstrating by clear and convincing evidence that he or she has met the requirements, as herein above set forth or as set forth in the Supreme Court order of disbarment or suspension, for re admission to the practice of law in the State of Idaho.

(3) **Manner of Hearing.** The hearing shall be conducted in the manner usual to District Courts of the State of Idaho and may be continued from time to time as the hearing committee, in its discretion, may permit.

(4) **Judicial Notice.** The committee may take judicial notice of facts entitled to such notice; provided, however, that the facts judicially noticed shall be specified by the committee either at the time of the hearing or at the time of declaring its findings, whichever it deems appropriate.

(A) **Further Hearing.** If the facts judicially noticed arc announced for the first time in or concurrent with the announcement of the committee's findings, the petitioner shall have the right to request further hearing on the facts so noted.

(i) **Place and Time of Filing.** Such request must be filed with the Clerk of the Professional Conduct Board, and served upon Bar Counsel, within fourteen (14) days of the date of the announcement of the committee's findings.

(5) **Report of Committee.** The hearing committee

shall file a report containing its findings and recommendations, together with the record, with the Clerk of the Professional Conduct Board. A copy of the committee's report shall be served on the petitioner and Bar Counsel.

(6) **Time of Decision.** The Hearing Committees decision shall be rendered within fourteen (14) days after the matter is full), submitted.

(7) **Submission to Court.** The Professional Conduct Board. shall cause the Clerk of the Professional Conduct Board to submit the entire record of the proceedings before the hearing committee to the Supreme Court and serve a copy thereof on petitioner and Bar Counsel.

(8) **Procedure After Submission.** After the filing of the record and exceptions, if any with the Supreme Court, the proceedings shall be in accordance with the following procedures:

(A) **No Exceptions.** In the event no exceptions to the findings and recommendations of the Hearing Committee are filed, the Supreme Court shall determine, in its discretion, whether oral argument and submission of briefs are required. In the event it is determined that submission of briefs and oral argument are not required, the Court shall promptly enter an appro priate order.

(B) **Exceptions.** In the event exceptions to the findings and recommendations of the Hearing Committee are filed, the party filing exceptions shall file his or her opening brief with the Clerk of the Supreme Court within twenty-eight (28) days after receiving notice that the record of the proceedings before the Hearing

Committee has been riled with the Supreme Court. The opposing party's brief shall be filed within twenty-one (21) days after the service of the excepting party's brief. Any reply brief shall be filed within fourteen (14) days after service of respondent's brief. Oral argument, if desired by the Supreme Court, shall be at a time and place scheduled by the Supreme Court. Following the conclusion of oral argument, the Court shall promptly enter an appropriate order.

(9) **Order of Court**

(A) **Adverse Determination.** If the petitioner is determined by the Supreme Court to be not fit to resume the practice of law, the petition shall be dismissed.

(B) **Reinstatement.** If, however, petitioner is found to be fit to resume the practice of law, the order of the Supreme Court may provide for reinstatement upon such conditions as the Supreme Court deems appropriate in the interest of justice, the public, the petitioner, the Bar and/or former or prospective clients of the petitioner.

(i) **Conditions.** Conditions on rein statement may include, but need not be limited to, payment of the costs and expenses of proceedings had in his or her case, restitution to parties harmed by petitioner's misconduct which constituted grounds for the suspension in his or her case; and/or petitioner's furnishing to the Supreme Court

such proof of competency as it may require, which proof may include certification by the Board of Commissioners that petitioner, subsequent to the date of such conditional order of reinstatement, has completed successfully an examination for admission to the practice of law in the State of Idaho.

**(Section (e) amended 5-29-91)*

*(f) **Waiver of Patient Privilege.** As part of a lawyer's petition for reinstatement under this rule, he/she shall agree to waive any patient privilege, insofar as any medical fact or opinion is, relevant to the applicant's reinstatement.
**(Section 69 added 3-1-88)*

RULE 519. Protection of Clients' Interests

(a) **Application - Grounds.** Any interested party may petition for appointment of a receiver to protect the interests of the clients and the lawyer upon a showing that them is no partner, executor or other responsible, willing party capable of conducting the affairs of-.

(1) A lawyer who has died or disappeared; or
(2) A lawyer who has been transferred to disability inactive status and who has failed to comply with Rule 517; or
(3) A lawyer who has been suspended or disbarred and who has failed to comply with Rule 517.

(b) Appointment of Receiver. Upon receipt of the application, the Supreme Court or the administrative judge in the judicial district in which a lawyer resided or engaged in any substantial practice of law shall

appoint a lawyer or lawyers to inventory the files of such lawyer and to take such action as is reasonably necessary to protect the interests of such lawyer and his or her clients.

(c) **Conflict of Interest.** In the event of a conflict between the protection of such lawyer or his or her clients, priority shall be given to the protection of clients.

(d) **Access to and Custody of Files.** The appointee or appointees shall be entitled to access to and custody of the lawyer's files and may invoke the subpoena power of the appointing authority when necessary to carry out his or her duties as provided in this Rule or obtain an order of the Supreme Court or administrative judge to obtain access to and custody of such files upon a showing of necessity.

(e) **Powers and Duties of Appointees.** After obtaining access to and custody of the lawyer's files, the appointee or appointees shall:

(1) Inventory the files and file, with the Supreme Court and the Clerk of the Professional Conduct Board, a copy of the inventory.

(2) Notify each client of his or her right to obtain any papers or other property to which he or she is entitled and the times and places at which the papers or other property may be obtained, calling attention to any urgency in obtaining the papers or other property.

(3) Release to each client, upon request and the signing of proper releases, the papers and other property to which he or she is entitled.

(4) File with the Court and the Clerk of the Professional Conduct Board, at least quarterly, a report concerning the progress of the appointee or

appointees in fulfilling his or her duties under these Rules and the Court order of appointment.

(5) File a final report with the Court and the Clerk of the Professional Conduct Board, including a request for release from the order of appointment and for disposition of any and all files which remain in the control and custody of such appointee or appointees.

(6) Seize all trust and operating accounts of the Defendant or Respondent attorney, including all accounts on which said attorney is principal or trustee. The appointee or appointees shall serve a copy of the Order of appointment on all financial institutions holding such accounts, which Order shall constitute an injunction against said financial institutions from disbursing monies on the signature of the Defendant or Respondent attorney or at his or her direction. Service of the Order on a financial institution shall permit the appointee(s) to substitute his or her authority for that previously held by the Defendant or Respondent in all respects with regard to said accounts.

(f) **Nondisclosure of Client Information.** Any lawyer so appointed shall not be permitted to disclose any information contained in any file so inventoried without the consent of the client to whom such file relates, except as necessary to carry out the order of the authority which appointed the lawyer to make such inventory.

(g) **Immunity**

(1) **Absolute.** Such appointee or appointees shall be immune from civil liability for acts and omissions in the performance of duties under this Rule, except for demonstrated fraudulent or malicious conduct, so long as he or she or they are acting:

(A) Pursuant to any order made under or pursuant to these Rules; or

(B) Pursuant to any like or similar order directing or providing for legal assistance to clients or of persons adversely affected by the lawyer; or

(C) Pursuant to this particular Rule or any similar request or direction by the Idaho State Bar of an appointed or acting lawyer to so act in the public interest or for the protection of any member of the public.

(2) **No Immunity.** The provisions of this Rule shall not, however, provide immunity to any lawyer, whether or not appointed and whether or not originally concerned with the matter by reason of any appointment, order or relationship of the kinds enumerated above, if it be legal work which he or she has agreed to do for a fee which has been privately negotiated with, and agreed to by, the client.

(3) **Qualified Immunity.** Notwithstanding the provisions of subsection (2) of this Rule, to the extent that a lawyer provides services under this Rule, which work or services reasonably and equitably justifies the charging or reserving of a fee for legal services, qualified immunity shall apply even though such fee be fixed and charged if the same is pursuant to the appointing or authorizing authority or the Supreme Court and is not pursuant to a negotiated private fee arrangement with such client.

(A) **Fees Allowed by Court.** This Rule shall not be construed to limit or preclude the Supreme Court or appointing authority from allowing reasonable tees in proper cases for work done pursuant to any

directive, order or authorization in keeping with these Rules, which fees may be accepted without waiver of or prejudice to the qualified immunity herein above provided so long as the fees are not privately negotiated.

(h) **Referral of Fee-generating Work.** In administering this Rule, it is intended that as a general rule and when reasonably convenient to do so, fee producing work which can be placed with private practitioners for handling under reasonable and customary arrangements for remuneration will be so placed and will not be retained by appointed or designated counsel, and all exceptions thereto shall be made pursuant to and upon notice to the appointing court or authority. This Rule shall not be applied so as to force representation upon any client if he or she objects thereto.

(i) **Duty of Lawyers.** It shall be the duty of all licensed lawyers to share cooperatively in the provision of services under this Rule and, when necessary, to do so without remuneration, though it shall not be their duty to bear expenses or costs incident to such services.

RULE 520. Immunity

(a) **Grievants - Witnesses.** Grievances, complaints, testimony and other presentation or arguments submitted to the Professional Conduct Board, a hearing committee, any member of the Professional Conduct Board or of any such committee, or Bar Counsel, all proceedings and conduct maintained or engaged in under these Rules, and all testimony and showings with respect to any of said matters shall be absolutely privileged, and no civil litigation predicated thereon may be instituted or maintained.

(b) **Disciplinary Authorities.** Members of the Professional Conduct Board, members of the hearing committees, Bar Counsel,

members of the Board of Commissioners, and members of their respective staffs shall be immune from civil suit and damages for any conduct or occurrence in the course of or arising out of performance of any official duties in connection with these Rules.

RULE 521. Confidentiality

*(a) **Generally.** All records concerning allegations of misconduct by or the disability of any lawyer shall be kept confidential, except that the following records shall be considered open for public inspection:

(1) Formal charge petitions and all subsequent pleadings, documents, evidence, and testimony filed before the Professional Conduct Board or a hearing committee;

(2) Petitions for transfer to disability inactive status filed with the Supreme Court;

(3) Records to which a defendant has waived his or her right to confidentiality either by his or her written waiver or by his or her conduct;

(4) Records which are already public records, or those which have already become generally known to the public.

*(b) **Exception for Public Protection.** Subsection (a) notwithstanding, Bar Counsel may disclose otherwise confidential records if there is a need to notify another person or organization, including the clients' security fund, in order to protect the public, the administration of justice, or the legal profession.

*(c) **Public Hearings.** Upon filing and service of formal charges in a professional conduct matter, or filing of a petition for reinstatement, all hearings shall be open to the public, except for

(1) deliberations of the hearing committees, Board or Court;

(2) aspects of the hearing with respect to which the

hearing committee, Board or Court has issued a protective order.

(d) **Protective Orders.** Subsection (a) notwithstanding, in order to protect the interests of a grievant, witness, third party or defendant, tile hearing committee or Board may, upon application and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise not privileged or confidential and direct that the proceedings be conducted so as to implement the order.

**(Sections (a)-(d) amended 3-15-91)*

(e) **Nonpublic Information.**

(1) **Request.** A request for nonpublic information other than that authorized for disclosure under sub section (a) of this Rule shall be denied unless the request is from one of the following agencies:

(A) agencies authorized to investigate qualifications for admission to practice;

(B) agencies authorized to investigate qualifications for government employment;

(C) lawyer disciplinary enforcement agencies;

(D) other agencies, if any designated by the court.

(2) **Disclosure without Waiver.** If the Board or counsel decide to provide nonpublic information requested, and if the lawyer has not signed a waiver permitting the requesting agency to obtain nonpublic information, the lawyer shall be notified in writing at his or her last known address of that information which has been requested and by whom, together with a copy of the information proposed to be released to the requesting agency. The notice shall advise the lawyer that the information shall be released at the end of seven (7) days following mailing of the notice unless the

lawyer obtains a court order to prevent such disclosure.

(A) If an otherwise authorized requesting agency has not obtained a waiver from the lawyer to obtain nonpublic information, and requests that the information be released without giving notice to the lawyer, the requesting agency shall certify that:

(i) the request is made in furtherance of an ongoing investigation into misconduct by the lawyer;

(ii) the information is essential to that investigation; and

(iii) disclosure of the existence of the investigation to the lawyer would seriously prejudice that investigation.

(f) **Duty of Participants and Witnesses.** All participants and witnesses in the proceeding shall maintain the confidentiality of the proceeding and failure to do so shall constitute contempt of the Supreme Court.

(g) **Report to National Discipline Data Bank.** The Clerk of the Professional Conduct Board shall transmit notice of all public sanctions imposed by the Supreme Court upon a lawyer or the transfer to inactive status due to disability of any lawyer to the National Discipline Data Bank maintained by the American Bar Association.

(h) **Order by Court to Make Public.** Notwithstanding any other provisions of these Rules, the Supreme Court may provide by order that review of professional conduct proceedings in a particular case,, in all cases or in any class or group of cases are open to the public, subject to special or protective orders of the Supreme

Court. Bar Counsel and any other member of the Bar or the public shall have standing to petition the Court for a determination leading to the waiver of confidentiality in such proceedings in particular cases, and the Supreme Court may grand or deny such petitions in whole or in part as, in its discretion and in the interest of justice, it deems proper.

RULE 522. Additional Rules of Procedure

(a) **Record Availability.** The record of a hearing shall be made available to the defendant, at defendant's expense, on written request made to the Clerk of the Professional Conduct Board. The record shall not be made available to the public unless the provisions of Rule 521 of these Rules is determined not to apply.

(b) **Time Requirements.** Except as is otherwise provided in these Rules, the time in which any act or any thing is to be done or performed is not jurisdictional.

(c) **Rules of Civil Procedure.** Except as specifically adopted or referred to in these Rules, the provisions of the Idaho Rules of Civil Procedure shall not apply in disciplinary cases.

(d) **Character of Proceedings.** Disciplinary proceedings are neither civil nor criminal but are sui generis.

(e) **Rules of Evidence.** The rules of evidence, generally applicable in civil actions in the District Courts, shall apply during the proceedings under these Rules; except as may be otherwise provided by these Rules.

(f) **Standard of Proof.** Any issue of fact shall be proved by clear and convincing evidence.

(g) **References.** When the Supreme Court has occasion to make a finding of fact in proceedings under or in connection with

these Rules, it may refer the matter to a special fact-finding committee or referee specially appointed for that purpose or may authorize the Professional Conduct Board or any hearing committee so to serve.

(h) **Pleadings.** The form, style and content of all pleadings shall conform to the provision of Rule 10 of the Idaho Rules of Civil Procedure,

(i) **Signing of Pleadings.** The provisions of Rule I I of the Idaho Rules of Civil Procedure are incorporated herein.

RULE 523. Service

*(a) **Complaints and Petitions.** Service of complaints and petitions under these Rules shall be made by certified mail, return receipt requested, to the lawyer's address as filed with the Idaho State Bar. In the event service cannot be made upon a lawyer, either because the address on file with the Idaho State Bar is no longer effective or because the lawyer fails or refuses to accept delivery of mail at that address, service will be deemed complete fourteen (14) days after reasonable notice by publication in The Advocate.
**(Section (a) amended 2-13-92 -Effective 7-1-92)*

(b) **Answers, Responses, and Other Papers.** Service of answers and responses and other papers under these Rules shall be made in conformance with Rule 5(a), (b) and (f) of the Idaho Rules of Civil Procedure.

(c) **Number of Copies.** All pleadings and papers to be filed or served consist of

(1) an original and twelve (12) copies when the matter is before the Professional Conduct Board; and

(2) an original and four (4) copies when the matter is before a Hearing Committee.

(d) **Place of Filing.** All filing of documents and papers required under the provisions of these Rules to be served upon the Professional Conduct Board or Hearing Committees shall be filed with the Clerk of the Professional Conduct Board at the Idaho State Bar, P. 0. Box 895, Boise, Idaho 83701.

RULE 524. Subpoena Power, Witnesses, Pre-Trial Procedures

*(a) **Subpoenas**

(1) **Power to Issue.** Pursuant to the authority of Title 3, Chapter 4, Idaho Code, the power to issue subpoenas, for the purposes stated in Rule 45 of the Idaho Rules of Civil Procedure, in proceedings under these Rules under the circumstances specified, is granted as follows:

(A) In any proceeding under these Rules, to any member of the Professional Conduct Board.

(B) In any proceeding pending before a hearing committee, to any member of said committee.

(C) In the investigation or prosecution of any matter under these Rules, to Bar Counsel.

(2) **No Blank Subpoenas.** No subpoena issued under this Rule shall be issued in blank. Each person authorized to issue subpoenas shall notify the Chairman of the Professional Conduct Board of each subpoena issued and cause a copy of such subpoena issued to be inserted in the record.

(3) **Issue in Name of Board.** All subpoenas shall be issued in the name of the Professional Conduct Board of the Idaho State Bar, by the Clerk of the Conduct Board and/or such other designees as may be appointed by the Chairman of the Professional Conduct Board.

(4) **Confidentiality.** Subpoenas issued by Counsel

during the course of an investigation shall clearly indicate on their face that they are issued in con junction with a confidential investigation under these rules and that it is regarded as contempt of court or grounds for discipline to breach confidentiality. Consultation with an attorney is not considered such a breach.

(5) **Issuance on Behalf of Defendant.** A defendant against whom a complaint has been filed with the Professional Conduct Board may have subpoenas issued on his or her behalf, upon reasonable and timely request filed with the Clerk of the Professional Conduct Board.

(6) **Failure to Comply with Subpoena.** Failure to comply with any subpoena issued as provided in this Rule shall subject the party served therewith to any and all procedures and/or penalties provided by law and particularly provided under Idaho Code Sec. 3-414; Rule 45(f), Idaho Rules of Civil Procedure; and Title 7, Chapter 6, Idaho Code, or as is otherwise provided by law. The District Court of the judicial district in which the attendance or production is required, upon the petition of Bar Counsel or the defendant, shall enforce the atten dance and testimony of any witness and the production of any documents so subpoenaed. Witness fees and mileage shall be paid in the same manner as in District Court proceedings.

(7) **Oaths and Affirmations.** Any member of the Professional Conduct Board, any member of a hearing committee in matters pending before it, and Bar Counsel in matters under investigation or prosecution by him or her may administer oaths and affirmations.

**(Section (a) amended 3-1-88)*

(b) **Discovery.**

(1) **When Permitted.** Discovery shall be permitted as provided by the Idaho Rules of Civil Procedure.

(2) **Disputes.** Disputes concerning the scope and other aspects of discovery shall be determined by the Chairman of the hearing committee before which the matter is pending. All discovery orders by the hearing committee chairman are interlocutory and may not be appealed prior to the entry of the final order.

(3) With the approval of the hearing committee or Professional Conduct Board, testimony may be taken by deposition or by commission if the witness is not subject to service of subpoena or is unable to attend to testify at the hearing because of age, illness or other infirmity. A complete record of the testimony so taken shall be made and pre served.

(c) **Pre-Hearing Conference.** At the discretion of the hearing committee or the Professional Conduct Board, a pre-hearing conference may be ordered to consider matters similar to those set forth in Rule 16(a), Idaho Rules of Civil Procedure.

(d) **Protective Requirements.** All subpoena and discovery procedures shall be subject to the protective requirements of confidentiality provided in Rule 521.

RULE 525. Expunction of Records

(a) **Expunction Self-Executing.** All records relating to a grievance or complaint terminated by dismissal shall be expunged from the files of the Idaho State Bar after five (5) years have elapsed from the date of dismissal.

(b) **Definition.** The terms "expunge" and "expunction" shall

mean that all records or other evidence of the existence of the grievance or complaint shall be destroyed except that a docket, showing the names of each grievant and defendant, the final disposition, and the date all records relating to the matter were expunged shall be maintained.

(c) **Notice to Defendant.** IF the defendant was contacted by Bar Counsel concerning the grievance, or if Bar Counsel knows that the defendant is otherwise aware of the existence of a grievance, the defendant shall be given prompt written notice of the expunction.

(d) **Effect of Expunction.** After a file has been expunged, any response to an inquiry requiring a reference to the matter shall state that any record which Bar Counsel, a hearing committee or the Professional Conduct Board may have had of such matter has been expunged and, in addition, shall state that no inference adverse to the respondent is to be drawn on the basis of the incident in question. The defendant may answer any inquiry requiring a reference to an expunged matter by stating that the complaint was dismissed and thereafter expunged pursuant to court rule.

(e) **Retention of Records.** Upon application to a hearing committee or the Professional Conduct Board by Bar Counsel, for good cause shown and with notice to the defendant and opportunity to be heard, records which should otherwise be expunged under this Rule may be retained for an additional three (3) years as the hearing committee or the Professional Conduct Board deems appropriate. Bar Counsel may seek a further extension of the period for which retention of the records is authorized whenever a previous application has been granted for the maximum permitted hereunder.